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APPENDIX A: UPDATED OPINION AND ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 5, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRISCILLA LEFEBURE,

Plaintiff-Appellee,

v.

SAMUEL D'AQUILLA, 20TH JUDICIAL DISTRICT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY,

Defendant-Appellant.

No. 19-30702 CONSOLIDATED WITH No. 19-30989

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:17-CV-1791

Before: OWEN, Chief Judge, and GRAVES and HO, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

James C. Ho, *Circuit Judge*:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is denied. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is denied.

We withdraw the court's prior opinion of February 9, 2021, and substitute the following opinion.

* * *

If anyone deserves to have her day in court, it is Priscilla Lefebure. The allegations in her complaint are sickening: Barrett Boeker, her cousin's husband, raped and sexually assaulted her on multiple occasions at his home on the grounds of the Louisiana state prison where he serves as an assistant warden. Boeker then conspired with the district attorney, Samuel D'Aquilla (as well as his own counsel, who happens to be a relative of D'Aquilla's), to ensure that he would not be investigated or prosecuted for his crimes. In response, Lefebure filed this suit against D'Aquilla (as well as Boeker and others) on various constitutional and statutory grounds.

It is difficult to imagine anyone who deserves justice more than Priscilla Lefebure. But her claim against D'Aquilla runs into a legal obstacle that the panel has no discretion to ignore. Supreme Court precedent makes clear that a citizen does not have standing to challenge the policies of the prosecuting authority unless she herself is prosecuted or threatened with prosecution. *See Linda R.S. P. Richard D.*, 410 U.S. 614, 617-19 (1973).

Under this established principle of standing, each of us has a legal interest in how we are treated by law enforcement—but not a legally cognizable interest in how *others* are treated by law enforcement. So people accused of a crime have an obvious interest in being treated fairly by prosecutors. And victims of crime have a strong interest in their own physical safety and protection. But victims do not have standing based on whether *other* people—including their perpetrators—are investigated or prosecuted.

Every court to have addressed this question prior to this case agrees that a crime victim may not challenge a prosecutor's failure to investigate or prosecute her perpetrator. Neither Lefebure nor the amicus brief filed in her support cite any authority to the contrary. In sum, we have no choice but to reverse and remand with instructions to dismiss the complaint for lack of subject matter jurisdiction as to D'Aquilla.

I.

We accept, as we must at the motion to dismiss stage, the allegations contained in Lefebure's complaint as true. They are as follows:

Forced to evacuate her home in Baton Rouge due to flooding, Lefebure resided temporarily with her cousin and her cousin's husband, Boeker. Their home is located on the grounds of the Louisiana State Penitentiary, where Boeker serves as an assistant warden.

Boeker raped and sexually assaulted her on multiple occasions there. First, he raped her in front of a mirror, where he made her watch, while telling her that no one would hear her scream. Later, he sexually assaulted her with a foreign object, after picking

the lock of the room where she was attempting to hide. Afterward, she tried to lock the door again, but he again proceeded to pick the lock and blocked her escape.

A few weeks later, Boeker was arrested for second degree rape. But no indictment was ever brought.

That's because, shortly after his arrest, Boeker met on multiple occasions with D'Aquilla, the district attorney for Louisiana's 20th Judicial District, along with Boeker's defense counsel, a relative of the district attorney, and Austin Daniel, West Feliciana Parish Sheriff. At those meetings, they conspired to protect Boeker from investigation and prosecution. They agreed that Boeker was telling the truth and that Lefebure was lying.

Furthermore, Boeker falsely represented to others that he was being investigated by D'Aquilla and Daniel, according to the complaint, "so as to hide the conspiracy and ensure he would not face criminal liability for raping Ms. Lefebure."

Lefebure filed suit against D'Aquilla and the others, seeking damages and declaratory and injunctive relief. With respect to D'Aquilla, she brought various claims under (1) the Equal Protection Clause of the Fourteenth Amendment, as well as Article I, Section 3 of the Louisiana Constitution (Right to Individual Dignity); (2) the Due Process Clause of the Fourteenth Amendment, as well as Article I, Section 2 of the Louisiana Constitution (Right to Due Process); (3) 42 U.S.C. §§ 1983 and 1985 for civil conspiracy to violate civil rights; and (4) 42 U.S.C. § 1983 for abuse of process.

D'Aquilla filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a

claim upon which relief can be granted, and asserted various defenses.

The district court granted in part and denied in part D'Aquilla's motion to dismiss. *Lefebure P. Boeker*, 390 F. Supp. 3d 729, 768 (M.D. La. 2019). It denied the motion to dismiss under Rule 12(b)(1), finding that Lefebure had standing. *Id.* at 746. It also dismissed some of her claims, and rejected many of D'Aquilla's asserted defenses as to her other claims. *Id.* at 747-50, 758, 763, 767-68.

The district court certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). D'Aquilla moved in this court for leave to appeal from the interlocutory order. This court granted the motion.

On appeal, counsel for Lefebure declined multiple opportunities to file a response brief. Counsel made four requests to extend the briefing deadline, between June and August 2020. This court granted each of those requests. After all those deadlines came and went, this court gave counsel further opportunity to file a brief out of time within ten days. Counsel declined to respond to our request or file a brief in this appeal, so the case was submitted with only D'Aquilla's brief. Counsel's failure to submit a brief "does not preclude our consideration of the merits" of D'Aquilla's appeal. *Hager v. DBG Partners, Inc.*, 903 F.3d 460, 464 (5th Cir. 2018). It merely forfeits the appellee's right to oral argument. *See* FED. R. APP. P. 31(c) ("An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.").

Following our initial decision in this case, counsel apologized for his previous oversights and sought re-

hearing en banc, supported by an amicus brief by three retired federal judges led by Alex Kozinski.

We review questions of subject matter jurisdiction de novo. *Jones v. United States*, 625 F.3d 827, 829 (5th Cir. 2010). We now withdraw our earlier opinion in this matter and substitute this opinion in order to explain why the arguments presented in the petition for rehearing en banc and amicus brief are foreclosed to this court as a matter of Supreme Court precedent.

II.

"Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact.'" *Id.* "Second, there must be a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon P. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976)).

Lefebure seeks to hold the prosecutor accountable for injuries she suffered from her assailant. No one doubts, of course, that crime victims suffer an injury in fact. *See Linda R.S.*, 410 U.S. at 618 ("appellant no doubt suffered an injury"). And Lefebure suffered one of the most horrific crimes imaginable. But long-standing Supreme Court precedent confirms that a crime victim lacks standing to sue a prosecutor for failing to investigate or indict her perpetrator, due to lack of causation and redressability. *See id.* ("the bare existence of an abstract injury meets only the first half of the standing requirement").

As Justice Marshall wrote for the Court in *Linda R.S.*, even "if appellant were granted the requested relief, it would result *only* in the jailing of the child's father." *Id.* at 618 (emphasis added). As the majority concluded, it is "only speculative" that "prosecution will . . . result in [the deterrence of crime]"—"[c]ertainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated . . . is absent." *Id.* Accordingly, "[t]he Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at 619.

In reaching this holding, the Court repeatedly emphasized "the special status of criminal prosecutions in our system." *Id. See also*, *e.g.*, *id.* at 617 (noting "the unique context of a challenge to a criminal statute"). It is a bedrock principle of our system of government that the decision to prosecute is made, not by judges or crime victims, but by officials in the executive branch. And so it is not the province of the judiciary to dictate to executive branch officials who shall be subject to investigation or prosecution. As the Supreme Court has unanimously observed, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States P. Nixon*, 418 U.S. 683, 693 (1974) (citing cases). Chief Justice Roberts has likewise noted that "[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another." *Robertson P. U.S. ex rel. Watson*, 560 U.S. 272, 278 (2010) (Roberts, C.J., dissenting from dismissal of the writ of certiorari as improvidently

granted). "The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government." *Id.* at 273.

The standing analysis in *Linda R.S.* reinforces this constitutional allocation of power among the branches of government. The requirement of standing under Article III of the Constitution is, of course, a doctrine that is itself based on the separation of powers. "The law of Article III standing . . . is built on separation-of-powers principles," for it "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester, N.Y. P. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Clapper P. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). *See also Raines P. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen P. Wright*, 468 U.S. 737, 752 (1984)) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

In short, it is not the province of the judiciary to dictate prosecutorial or investigative decisions to the executive branch. And if that is so, then it is understandable why plaintiffs would lack standing to seek judicial review of such executive decisions, as the Court held in *Linda R.S. See*, *e.g.*, 410 U.S. at 619 (invoking fundamental principles of "American jurisprudence" to explain why "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

As a result, courts across the country have dutifully enforced this rule in case after case—refusing to hear claims challenging the decision not to investigate or prosecute another person. *See*, *e.g.*, *United States v. Grundhoefer*, 916 F.2d 788, 792 (2nd Cir.

1990) ("[A] private citizen generally lacks standing 'to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.'") (quoting *Linda R.S.*); *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (rejecting claim that crime victims have "an enforceable right as a member of the public at large and as a victim to have the defendants criminally prosecuted"); *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990) (affirming dismissal of a prison inmate's claim against the sheriff for failing to press criminal charges against correctional officers involved in an alleged assault because the plaintiff "does not have a constitutional right to have someone criminally prosecuted"); *Mitchell v. McNeil*, 487 F.3d 374, 378 (6th Cir. 2007) ("There is no statutory or common law right, much less a constitutional right, to an investigation."); *Parkhurst v. Tabor*, 569 F.3d 861, 866 (8th Cir. 2009) ("federal courts have maintained the distinction in standing between those prosecuted by the state and those who would urge the prosecution of others"); *Sargeant v. Dixon*, 130 F.3d 1067, 1069-70 (D.C. Cir. 1997) (if a person has "an interest in 'being heard' by the grand jury," it is "only because" he has an "interest in seeing certain persons prosecuted"—which is "not legally cognizable within the framework of Article III" under *Linda R.S.*).

And that is so whether the suit is for injunctive relief or damages. *See*, *e.g.*, *Parkhurst*, 569 F.3d at 865 (suit for damages and injunctive relief); *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 901 (7th Cir. 2012) (en banc) (Easterbrook, C.J., concurring)) (crime victims are "not entitled to an order requiring arrest or prosecution of [their assailants], or to damages because of public officials' decision not to do so") (collecting cases).

Yet that is precisely what this suit is—a complaint that a prosecutor has failed to investigate and prosecute another person. *See* First Amended Complaint & Jury Demand at 2, 7, 16, 21-22, *Lefebure P. Boeker*, 390 F. Supp. 3d 729 (M.D. La. 2019) (ECF No. 37) (alleging that D'Aquilla and other officials conspired to ensure that Boeker "would not be held accountable for his actions," would be "protect[ed] . . . from prosecution," "would not be convicted of the alleged rapes," would "walk[] free," and would be "protect[ed] . . . from criminal liability"). *See also Lefebure*, 390 F. Supp. 3d at 745 (acknowledging that "the alleged failure to fully investigate was motivated by a preference in the prosecutorial outcome").

Accordingly, established precedent requires us to conclude that Lefebure lacks standing to sue D'Aquilla based on his failure to prosecute or even investigate Boeker.

A.

On appeal, Lefebure contests none of this. She simply insists that courts must be able to review her case—notwithstanding *Linda R.S.*—because the decision not to prosecute Boeker may have been based on a broader, discriminatory non-prosecution policy.

But her complaint is premised on allegations of a specific conspiracy between various officials and attorneys, including D'Aquilla, to shield Boeker in particular from prosecution. Her complaint alleges a series of conspiratorial meetings between the defendants to discuss the Boeker case in particular, an agreement that Boeker was telling the truth and Lefebure was lying, and a strategy to conceal the conspiracy by falsely representing to the world that

the case was being faithfully investigated and dutifully considered for prosecution, when in fact the parties had already agreed to sweep her claims under the rug.

And in any event, we do not see how we can in good faith distinguish *Linda R.S.* based on the theory that the decision not to prosecute in this case was in fact dictated by a broader, discriminatory policy not to investigate or prosecute cases involving a certain protected class of victims in violation of the Equal Protection Clause. After all, that was precisely the complaint in *Linda R.S.* as well. There the plaintiff alleged that "the policies of the prosecuting authority," which require "declining prosecution" in cases like hers, unconstitutionally "discriminate[]" against victims like her "without rational foundation and therefore violate[] the Equal Protection Clause of the Fourteenth Amendment." *Linda R.S.*, 410 U.S. at 616, 619. *See also id.* at 621 (White, J., dissenting) (noting the implications of the Court's logic for other equal protection claims, including those based on race).

Our sister circuits have likewise construed *Linda R.S.* to foreclose suit—and that is so despite the fact that the plaintiffs there alleged unconstitutional discrimination.

For example, in *Parkhurst*, the Eighth Circuit observed that, "[w]hile it is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim, this right has not been extended to crime victims. The lower federal courts have maintained the distinction in standing between those prosecuted by the state and those who would urge the prosecution of others, *even when the failure to prosecute was allegedly discriminatory*." 569 F.3d at 865-66 (cleaned up and

emphasis added) (citing *Linda R.S.* and other authorities).

Likewise, in *Grundhoefer*, the Second Circuit stated that "[t]he interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern." 916 F.2d at 792 (quotations omitted).

Similarly, in *Sattler*, the Fourth Circuit noted that "counsel suggested that Sattler had an enforceable right . . . as a victim to have the defendants criminally prosecuted. He further urged that such a right was protected by the equal protection clause of the fourteenth amendment. There is, of course, no such constitutional right." 857 F.2d at 227.

As Professor Laurence Tribe explained in his widely noted treatise on constitutional law, "while discriminatory enforcement of criminal laws may be challenged by those against whom such laws are *enforced*, persons injured by criminal conduct which goes *unpunished* because of discriminatory law enforcement do not ordinarily have standing to challenge the discrimination." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (3rd ed. 2000) (citing *Linda R.S.*). "The upshot of *Linda R.S.* . . . is that the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern; only if the litigant is immediately affected as a target of enforcement can that presumption be overcome." *Id.* at 418.

B.

Lefebure nonetheless suggests that various circuit precedents support her standing to sue the prosecutor here—and thus conflict with our earlier panel decision in this case.

1. Specifically, she claims that our decision conflicts with both *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000), and *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000).

But neither of these cases even mention, let alone analyze, standing presumably because no one challenged standing in these cases. And the same is true with the case identified by amici, *Elliot-Park v. Manglona*, 592 F.3d 1003 (9th Cir. 2010). We cannot rely on these decisions to justify standing when they do not even mention standing—let alone offer a theory for distinguishing *Linda R.S.*—let alone a theory that applies to the specific facts presented here. *See*, *e.g.*, *United States v. Doe*, 932 F.3d 279, 284 (5th Cir. 2019) (noting that we do not give precedential effect to a jurisdictional holding in a previous case when "we never stated the basis of our jurisdiction").

The amicus brief suggests we look past all of this. It says it should be enough that the courts in these cases "fail[ed] to perceive any standing difficulties" anywhere in these opinions.

But that would contradict over two centuries of Supreme Court teachings on this point—not to mention amici's own prior observations.

The Supreme Court has repeatedly instructed lower courts that, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal

decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (although "Article III standing was . . . assumed by the parties, and was assumed without discussion by the Court," "[w]e have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect"); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.") (collecting cases).

Indeed, amici have elsewhere expounded these very same principles, explaining that "courts routinely reject claims that plaintiffs have Article III standing based on the fact that prior similarly situated plaintiffs received a ruling on the merits, even though such a ruling must have implicitly held that the prior plaintiff did have standing." BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 87 (2016) (collecting cases). *See also id.* at 121 (same) (collecting cases).

2. There's an additional problem with the two cases cited by Lefebure. As noted, under *Linda R.S.*, victims of crime do not have a cognizable interest in the investigation or prosecution of others. But they of course have a compelling interest in their own physical safety and protection. As a result, crime victims have standing to sue when the police refuse to provide them with physical protection. That is because their complaint concerns their own treatment, not the treatment of others.

That principle provides yet another basis for distinguishing *Shipp* and *Estate of Macias*—both of which allege the failure to protect the plaintiff, rather than the failure to prosecute another person.

Cherie Shipp alleged that a group of sheriffs and deputies refused to provide police protection to women like her. She alleged that she was attempting to escape her abusive marriage with Dalton Shipp, and that she repeatedly called the sheriff's office seeking protection from him—but that the deputy "informed Shipp that he would do nothing about Dalton." *Shipp*, 234 F.3d at 909. As a result, Dalton repeatedly beat and later raped and shot his wife. Each time, the sheriff's office did nothing to stop the violence. *See*, *e.g.*, *id.* at 910 ("Deputy Cropper . . . chose to take no action, despite his knowledge of Dalton's propensity for violent behavior."); *id.* ("She screamed for help, but none of the deputies responded.").

In sum, *Shipp* is not about prosecutorial inaction but "police inaction." *Id.* at 912. "Specifically, Shipp claims that the defendants through their policies, practices, and customs afforded less protection to victims of domestic assault than other assault victims." *Id.* at 913.

The facts of *Estate of Macias* are similarly grotesque: A woman was repeatedly stalked and attacked by her former husband, with the full knowledge of the police—yet the police did nothing. *See* 219 F.3d at 1020–26. Over time, the violent acts escalated, and her husband eventually killed her. Her relatives and estate brought suit alleging that the officers "denied [her] right to equal protection by providing her with inferior police protection on account

of her status as a woman, a Latina, and a victim of domestic violence." *Id.* at 1019.

Here, by contrast, Lefebure does not contend that the police refused to protect her before some future assault by her assailant. Instead, she contends that prosecutors refused to investigate or prosecute him after the assault took place. Here, the appeal concerns only the prosecutor—it does not involve any police officer or other law enforcement official who could have provided her physical protection from an assailant yet failed to do so. *See also Parkhurst*, 569 F.3d at 866-67 (distinguishing *Estate of Macias* on the ground that "crime victims . . . have a right to challenge the allegedly discriminatory provision of police protection," whereas "[t]he Parkhursts claim to have been injured by a *failure to prosecute . . . rather than by a failure to provide police protection* to [the victim]") (emphasis added).

In sum, none of the cases cited by Lefebure allow a victim to challenge a prosecutor's decision not to investigate or prosecute another person.[1]

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[1] Lefebure also claims that our decision conflicts with *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974). But the court there found that "plaintiffs *lack* standing to sue." *Id.* at 680 (emphasis added).

Finally, the amicus brief also invokes *Bailey v. Patterson*, 369 U.S. 31 (1962). But it is unclear why amici think *Bailey* helps their cause. For one, *Bailey* simply recognized that railroad passengers have standing to challenge racial segregation on railroads—a proposition no one challenges here. *See id.* at 33 ("[A]s passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment."). What's more, *Bailey* expressly *reaffirms* the principle we dutifully enforce here—that individuals "lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege

C.

Both Lefebure and the amicus brief suggest that we should collapse this distinction between the failure to prosecute and the failure to protect—between the failure of police to protect the plaintiff from future crime and the failure of prosecutors to put a third party in jail for past crime.

To be sure, their reasoning is certainly understandable: If word were to get out that a district attorney categorically refuses to prosecute a certain type of crime, or will not prosecute crimes committed against a certain victim demographic, that would surely lead to greater criminal activity of that kind.

So we do not doubt the underlying premise: Less police, more crime. Likewise, less prosecution, more crime. Unquestionably, the denial of prosecution may very well be tantamount to a denial of protection.

But we have no authority to take Lefebure's premise where she wants it to go. For the Supreme Court made clear in *Linda R.S.* that any connection between a non-prosecution policy and subsequent criminal activity is too "speculative" to support standing.

1. The suit in *Linda R.S.* concerned a criminal statute for failure to pay child support. But the state applied that statute in an allegedly unconstitutional manner, by enforcing it as to legitimate children, but not as to illegitimate children.

Notably, the premise of the suit in *Linda R.S.* is indistinguishable from the premise of Lefebure's suit

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that they have been prosecuted or threatened with prosecution under them." *Id.* at 32.

here: The prosecutor adopted a discriminatory policy of non-prosecution—and that policy resulted in criminal misconduct that directly injured the plaintiff. As the complaint in *Linda R.S.* put it: "Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. . . . Plaintiff, Linda R.S. has been and will continue to be subjected to economic coercion." The plaintiff's Supreme Court brief made this point as well: "[I]f the District Attorney of Dallas County would enforce Article 602 against the parents of illegitimate children, those parents would contribute to the support and maintenance of their children rather than face the possible consequence of jail. Clearly, because the State of Texas through its District Attorney will not enforce the language of this statute against fathers of illegitimate children those children are not receiving economic benefits which they would otherwise receive."

The Court nevertheless denied standing. As the Court explained, the connection between punishing the perpetrator and preventing crime was too "speculative" to support standing. After all, even "if appellant were granted the requested relief, it would result *only* in the jailing of the child's father"—not the prevention of injury to the plaintiff. 410 U.S. at 618 (emphasis added). To be sure, the jailing of the child's father could have discouraged him from further criminal failure to pay child support. So failing to prosecute and jail the father could have caused the mother's injury. And holding the prosecutor liable could have redressed the mother's injury. But the majority in *Linda R.S.* held

that any such connection was too attenuated and "speculative" to support standing: "The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case." *Id.*

2. Reasonable minds can of course disagree about the wisdom of this conclusion. Indeed, Justice White did. In his dissent, he took on the majority on precisely this point.

"The Court states that the actual coercive effect of those sanctions on Richard D. or others 'can, at best, be termed only speculative.'" *Id.* at 621 (White, J., dissenting). "This is a very odd statement." *Id.* "I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law." *Id.* "[C]riminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children." *Id.*

But the majority went the other way, holding instead that the plaintiff "made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws." *Id.* at 619. *See also*, *e.g.*, Garner, *supra*, at 192 ("One important reason to read dissenting opinions is that they may clarify what the majority is doing.").

3. Our reading of *Linda R.S.* is further reinforced by Professor Tribe. As he put it, the standing analysis in *Linda R.S.* is not some "doctrinal quirk unique to the field of criminal law administration." Tribe, *supra*, at 418. Rather, it reflects the Court's "broader insistence on a clear showing that the action challenged has in fact *caused* an individual injury, and that a judicial pronouncement of rights will be likely to *redress* that injury." *Id.*

In short, Lefebure lacks standing due to lack of causation and redressability. As Tribe explains, *Linda R.S.* is based on the premise that "a victim of an undeterred crime is *not automatically* a victim of non-enforcement." *Id.* at 417 (emphasis added). And because the connection is not "automatic," then it is too attenuated for purposes of causation and redressability under *Linda R.S.*

D.

Undeterred, amici point out that *Linda R.S.* is merely a "5-to-4" decision on the issue of standing. But that is wrong—not to mention irrelevant. Two of the four justices who declined to join the majority did *not* say that the plaintiff had standing—to the contrary, those two justices noted that they would have preferred not to reach the standing issue at all, one way or another. *See Linda R.S.*, 410 U.S. at 622 (Blackmun, J., dissenting). And regardless (and as amici should well know), federal judges have no right to ignore Supreme Court decisions based on whether they are decided unanimously or by a 5-4 (or 5-2) vote.

Amici also float the notion that *Linda R.S.* "seems unlikely to have survived" various Supreme Court rulings issued over the "nearly fifty years" since that

decision. But once again, amici ignore decades of Supreme Court teachings. As the Court has repeatedly reminded us, the only court that can overturn a Supreme Court precedent is the Supreme Court itself. *See*, *e.g.*, *Agostini P. Felton*, 521 U.S. 203, 237 (1997) (even "if a precedent of this Court . . . appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quoting *Rodriguez de Quijas P. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Once again, amici know this. *See*, *e.g.*, *Carter P. Derwinski*, 987 F.2d 611, 613 n.1 (9th Cir. 1993) (Kozinski, J.) (en banc) (same) (quoting *Rodriguez*).

E.

Our original decision in this case was unanimous. Today the court reaches the same conclusion, based on the same reasoning, but this time by a 2-1 vote. Even so, there is substantial agreement over the substantive legal principles that decide this appeal, not to mention the likely ultimate outcome in this case.

To begin with, the dissent "agree[s] with the majority's view that a victim has no standing to pursue a claim against the district attorney for failure to prosecute her assailant under *Linda R.S.*" *Post*, at 25. "[T]he majority correctly observes [that] *Linda R.S.* precludes standing for those who allege an injury based solely on law enforcement's failure to prosecute someone who had already harmed them." *Id.*

In addition, the dissent agrees that "a dividing line exists between failure-to-protect and failure-to-

prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff has standing to pursue the former, but not the latter." *Id.* at 27. That is, of course, precisely our point. *See ante*, at 14 ("Lefebure does not contend that the police refused to protect her *before* some future assault by her assailant. Instead, she contends that prosecutors refused to investigate or prosecute him *after* the assault took place.") (emphasis added).[2]

1. The dissent nevertheless contends that this suit should be allowed to proceed based on the text and original understanding of the Equal Protection Clause: "As its words indicate, the Equal Protection Clause recognizes a right to equal enforcement of the law that encompasses equal *protection* for crime victims." *Post*, at 33. The dissent quotes Judge Easterbrook, who distilled the original meaning of the Equal Protection Clause as follows: "if the police and prosecutors protect white citizens, they must protect black citizens too." *Id.* at 34 (quoting *Del Marcelle*, 680 F.3d at 901 (Easterbrook, C.J., concurring)).

But Judge Easterbrook also explained that a faithful reading of precedent requires us to deny relief due to lack of standing. As he explained, "*Linda R.S.* [holds] that 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" *Del Marcelle*, 680 F.3d

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[2] It is not clear what the dissent means by "the majority's apparent avoidance" of the distinction between failure to prosecute and failure to protect claims. *Post*, at 27. Far from avoiding the issue, the distinction is essential to our analytical framework—indeed, it's precisely why we are required to reverse.

at 901 (Easterbrook, C.J., concurring) (quoting *Linda R.S.*, 410 U.S. at 619). "That is a limit on standing; *Linda R.S.* holds that there is no justiciable controversy, which knocks out *all* substantive legal theories." *Id.* So a plaintiff "is not entitled to an order requiring arrest or prosecution of [his assailants], or to damages because of public officials' decision not to do so." *Id.* *See also id.* (a plaintiff "needs to show how he was injured by what the defendants did *to* him, rather than by what they didn't do to other people or what they didn't do *for* him").

2. The dissent attempts to avoid established precedent by recasting this case as a failure to protect case, rather than as a failure to prosecute case. But the dissent acknowledges that at least "some of Lefebure's allegations sound in failure to prosecute." *Post*, at 30. And even setting those allegations aside, the dissent's theory is foreclosed by Supreme Court precedent.

In essence, the dissent theorizes that D'Aquilla's failure to prosecute might very well have "led to her assault." *Id.* at 32. And make no mistake we have no quarrel with this logic as a conceptual matter. Indeed, we have said as much ourselves: Less prosecution can lead to more crime—and liability rules can encourage or deter law enforcement activity and thereby affect crime rates. *See ante*, at 15.

But as we've explained, Supreme Court precedent prevents us from taking the dissent's logic where it wants us to go. After all, the dissent's theory is the same theory of standing that was pressed in the complaint in *Linda R.S.*, and embraced in Justice White's dissent, but rejected in Justice Marshall's majority opinion. Professor Tribe has confirmed this.

All agree that causation and redressability are too attenuated and speculative in cases such as this to warrant standing. And no one has cited a single case to the contrary. The cases cited by the dissent, much like the cases cited by Lefebure, involve the failure to protect, not the failure to prosecute recast as a failure to protect.

3. The dissent suggests that *Linda R.S.* is somehow distinguishable because the plaintiff here pleaded her case more carefully than the plaintiff did there. *Post*, at 31-32. But that ignores the passages from the complaint and substantive briefing in *Linda R.S.* that we noted earlier. *See ante*, at 15-16. Those passages confirm that, both here and in *Linda R.S.*, the plaintiff theorized that the defendant's discriminatory failure to prosecute "led to" her injury.

Moreover, if the dissent's theory were correct, it could presumably be deployed in *every* discriminatory failure to prosecute case—just replead every failure to prosecute claim as a failure to protect claim. But there's nothing in either the language or the logic of *Linda R.S.* to indicate that the Court saw this as a pleading problem, rather than as a standing problem. And the dissent certainly does not identify any such language in *Linda R.S.*

4. Finally, we note that the dissent ultimately concedes that the debate over the interpretation of *Linda R.S.* may not matter—that Lefebure might simply win the battle, only to lose the war. Because it's not enough to merely *plead* causation to survive dismissal—the plaintiff also must *prove* it to obtain judgment. To survive summary judgment, the plaintiff needs evidence that the prosecutor's failure did in fact cause the criminal act that she suffered. And as

the dissent notes, this might not be easy. "[I]t might be difficult for Lefebure to ultimately prove on the merits that the district attorney's policy, custom, or practice played a role in her assault." *Post*, at 35. So there may be little difference between the majority and the dissent as a practical matter.

III.

Reasonable minds can of course disagree over whether *Linda R.S.* was correctly decided.

As we have noted, for example, Justice White rejected the majority's notion that the connection between criminal law enforcement and crime rates is too "speculative" to confer standing. 410 U.S. at 621. *See ante*, at 17 (quoting Justice White). We have likewise observed that less police and less prosecution will indeed lead inevitably to more crime. *See ante*, at 15.

In addition, Professor Erwin Chemerinsky has persuasively criticized *Linda R.S.* as inconsistent with how courts characterize the nature of the injury in other equal protection contexts. Ordinarily, he explained, "[w]hen a plaintiff alleges a denial of equal protection, the injury is the denial of the ability to evenly compete." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 87 (6th ed. 2019) (citing, *inter alia*, *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). So "[e]ven if ultimately the plaintiff would not receive the benefit, a favorable court decision redresses the harm by providing equal opportunity." *Id.* "*Linda v. Richard* seems inconsistent with [these principles]

because there the claimed denial of equal protection was not deemed sufficient for standing." *Id.*

Professor Tribe has likewise disparaged *Linda R.S.* as "harsh," "bizarre," and not based on "sound reason" considering how courts have analyzed standing in other equal protection contexts. TRIBE, *supra*, at 417 n.8.

But if there is a case for revisiting *Linda R.S.* on these or other grounds, only the Supreme Court has the authority to do so.

* * *

Lefebure's story is one that is shared by all too many survivors who have been doubly victimized by the horrifying crime of sexual assault—first by their assailants, and then by a criminal justice system that fails to enforce the laws on the books. *See*, *e.g.*, *Pierre v. Vannoy*, 891 F.3d 224, 229 & n.5 (5th Cir. 2018) (reversing district court for its "troubling" decision to release convicted child rapist on the ground that rape is a form of sexual activity, and therefore it was perjury not to disclose prior rape when asked about child's prior sexual activity).

Moreover, Lefebure's story is particularly appalling because her alleged perpetrator holds a position of prominence in our criminal justice system as an assistant prison warden. We expect law enforcement officials to uphold the law, not to violate it—to protect the innocent, not to victimize them. "Nothing is more corrosive to public confidence in our criminal justice system than the perception that there are two different legal standards—one for the powerful, the popular, and the well-connected, and another for everyone else." *United States v. Taffaro*, 919 F.3d 947,

949 (5th Cir. 2019) (Ho, J., concurring) (discussing lack of prison time for chief deputy sheriff in Jefferson Parish despite multiple criminal convictions).

Put simply, Lefebure deserved to have the support of her state's elected and appointed prosecutors, investigators, and other officials in her pursuit of justice. If her account is correct, then the system failed her—badly.

We are horrified by the allegations in this case—the repeated acts of rape and sexual assault, followed by grotesque acts of prosecutorial misconduct. But we have no authority to overturn Supreme Court precedent. If we are to take seriously our obligation to follow Supreme Court precedent, whether we like it or not, then we must conclude that Lefebure lacks standing to sue D'Aquilla. As the adage goes, a principle is not a principle until it costs you. *Cf.* PSALM 15:4 (honoring those who "keep[] an oath even when it hurts").

If Lefebure or amici believe the Supreme Court erred in *Linda R.S.*, they are of course welcome to petition for a writ of certiorari. But for us to do as counsel and amici suggest would "replace judicial hierarchy with judicial anarchy." *M.D. P. Abbott*, 977 F.3d 479, 483 (5th Cir. 2020). *See also* THE FEDERALIST No. 78 (Alexander Hamilton) ("[t]o avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them").

We have no choice but to reverse and remand with instructions to dismiss the complaint for lack of subject matter jurisdiction as to D'Aquilla.

APPENDIX B: DISSENTING OPINION BY JUDGE GRAVES (OCTOBER 5, 2021)

James E. Graves, Jr., Circuit Judge, dissenting:

I agree with the majority's view that a victim has no standing to pursue a claim against the district attorney for failure to prosecute her assailant under *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973). But an individual may nevertheless have standing to pursue an equal protection claim against law enforcement for discriminatory under enforcement of the law. Because Lefebure seeks to do just that, I respectfully dissent.

I. Failure to Prosecute v. Failure to Protect

Linda R.S. holds that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." 410 U.S. at 619. Specifically, in that case, the Supreme Court determined that a plaintiff lacked standing to seek an injunction requiring her child's father to be prosecuted for failing to make support payments. As the majority correctly observes, *Linda R.S.* precludes standing for those who allege an injury based solely on law enforcement's failure to prosecute someone who had already harmed them. *Parkhurst v. Tabor*, 569 F.3d 861, 866 (8th Cir. 2009); *see Leeke v. Timmerman*, 454 U.S. 83, 85-86 (1981); *United States v. Grundhoefer*, 916 F.2d 788, 792 (2d Cir. 1990); *Doe v. Mayor & City Council of Pocomoke City*, 745 F. Supp. 1137, 1139-40 (D. Md. 1990); *see also Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (noting that there is no

"enforceable right . . . as a victim to have [] defendants criminally prosecuted").

In contrast, our circuit has recognized that equal protection suits based on discriminatory underenforcement of the law, known as failure-toprotect claims, can be brought against law enforcement officials. *Shipp v. McMahon*, 234 F.3d 907, 914 (5th Cir. 2000), *overruled in part on other grounds by McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc); *see Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004); *Cook v. Hopkins*, 795 F. App'x 906, 915 (5th Cir. 2019); *Kelley v. City of Wake Village*, 264 F. App'x 437, 442-44 (5th Cir. 2008). In *Shipp*, on which the district court relied, we held that treating domestic violence allegations—a category of crimes disproportionately reported by women—as less of a priority than others violates the Equal Protection Clause. *Shipp*, 234 F.3d at 914; *see DeShaney P. Winnebago Cnty. Dep't of Soc. SerPs.*, 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."). In doing so, we joined every circuit to consider this issue[1] and adopted the standard articulated in *Watson P. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988): "[T]o sustain a gender-based Equal Protection claim

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[1] *See Soto P. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Eagleston P. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson P. City of Chester Legal Dep't*, 864 F.2d 1026, 1030-31 (3d Cir. 1988); *Jones P. Union County*, 296 F.3d 417, 426-27 (6th Cir. 2002); *Hilton P. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000); *Ricketts P. City of Columbia*, 36 F.3d 775, 780 (8th Cir. 1994); *Estate of Macias P. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Watson P. City of Kansas City*, 857 F.2d 690, 695-96 (10th Cir. 1988).

based on law enforcement policies, practices, and customs toward domestic assault and abuse cases, a plaintiff must show: (1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice." *Shipp*, 234 F.3d at 914. We also explained that under the last requirement—causation—"law enforcement would not be held liable for generalized harms that are not traceable to their conduct, policies, or customs" and "would not be called to answer for those injuries that are solely attributable to the perpetrators of the underlying domestic assault." *Id.*

The basic holding of the *Shipp* line of cases is this: an equal protection violation may be found when women who have suffered domestic abuse allege that law enforcement's discriminatory policy of underenforcing domestic violence laws provided a breeding ground for the abuse to occur. *Shipp*, 234 F.3d at 914; *see, e.g., Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Watson*, 857 F.2d at 696. None of these cases suggests there is any standing problem with a failure-to-protect claim like that of a failure-to-prosecute claim.

Thus, despite the majority's apparent avoidance of it, a dividing line exists between failure-to-protect and failure-to-prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff has standing to pursue the former, but not the latter. *See Parkhurst*, 569 F.3d at 867; *see also Nader v. Saxbe*, 497 F.2d 676, 681 & n.27 (D.C. Cir. 1974)

(explaining that while *Linda R.S.* precludes standing for a plaintiff to seek the "prosecution of a particular individual," it does not prevent standing in all suits in which "victims or potential victims of criminal acts sue to correct allegedly unlawful prosecutorial conduct"). In other words, one does not have standing to allege an injury based solely on law enforcement's failure to prosecute someone who has already harmed her, but she does have standing to allege that a discriminatory underenforcement of the law played a part in causing the harm she suffered. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[I]n an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law."); *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 253 (5th Cir. 2018) ("[P]laintiffs must show that the State is the 'moving force' behind the deprivation.") (quoting *Kentucky*, 473 U.S. at 166); *Bedford v. City of Mandeville*, No. 98-31168, 1999 WL 33964096, at *3 (5th Cir. Oct. 22, 1999) ("In an official capacity suit against a public official the government entity's policy or custom must have played a role in the constitutional violation.").

Unlike in failure-to-prosecute cases, where a third-party wrongdoer is the source of the direct harm the plaintiff suffered as a crime victim, the allegation in failure-to-protect claims is that law enforcement practices played a role in the plaintiff's victimization. *See, e.g., Shipp*, 234 F.3d at 909 (failure to enforce laws meant to prevent domestic abuse led to plaintiff's shooting at hands of estranged spouse); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1022-26 (9th Cir. 2000) (repeated failure to enforce restraining order led to death at hands of abuser); *Watson*, 857 F.2d at

696 (holding that a jury could infer the plaintiff's "injuries were a result of the policy" of nonenforcement).

Such failure-to-protect claims may include allegations that law enforcement's discriminatory inaction increased the likelihood of crimes or even directly led to crimes against a certain group. This is implicit in some cases—that is, discriminatory refusal to enforce restraining orders and other domestic violence laws logically increases the risk of harm to women—but explicitly stated in others, like here. For example, a court held that a plaintiff stated a failure-to-protect claim by alleging that police officials' "failure to prosecute known and identified perpetrators" of attacks against Indian Americans was based upon race and had the effect of encouraging such attacks, leading to the death of the plaintiff's son. *Mody v. City of Hoboken*, 758 F. Supp. 1027, 1028, 1031 (D.N.J. 1991), *aff'd*, 959 F.2d 461 (3d Cir. 1992). The plaintiff alleged that the "defendants refused to file criminal complaints against people who had engaged in attacks against Indians, sending a message to the larger community that if they committed violent acts against Indians they would not be held accountable." *Id.* at 1031. These kinds of claims may be difficult to prove on the merits, *see* 959 F.2d at 461 (noting verdict was for the defense), but they are cognizable; their ultimate success depends on the plaintiff's establishing a causal link between the discriminatory policy and a subsequent injury.[2] *See Shipp*, 234 F.3d at 914 (noting

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[2] As I discuss more fully below, we must carefully avoid conflating the requirements for ultimate success on the merits and that which is necessary to confer standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, gen-

the "causation requirement" for failure-to-protect claims); *accord Mody*, 959 F.2d at 466 (stating a plaintiff must "establish[] a causal relationship between the discriminatory policy and the injury [suffered]").

Although failure-to-protect claims are usually brought against the police, the same logic applies to prosecutors. Prosecutors are, after all, part of law enforcement, and if anything, they may have more power to implement discriminatory policies than the average officer out on patrol. *See Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power . . . placed in the hands of a prosecutor with respect to the objects of his investigation."); John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 574 (2018) ("Perhaps the single most important actor in the criminal justice system today is the prosecutor."). The paucity of failure-to-protect cases against prosecutors likely stems in part from absolute prosecutorial immunity. But while prosecutors enjoy immunity from suits filed against them in their individual capacity, *see Imbler v. Pachtman*, 424 U.S. 409 (1976), Lefebure sued D'Aquilla in both his individual and official capacities. The latter is essentially a *Monell* claim of municipal liability, for which there is not an immunity defense. *See Connick v. Thompson*, 563 U.S. 51, 59-60 (2011) (addressing claim brought against Orleans Parish District Attorney in his official capacity under *Monell* standards); *see also Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (refusing to apply immunities for personal

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eral factual allegations of injury resulting from the defendant's conduct may suffice" to confer standing.")

liability to *Monell* claims against local governments because "there is no tradition of immunity for municipal corporations").

Accordingly, if Lefebure were challenging only the failure to prosecute her attacker, then her claim would be barred by *Linda R.S.* But if Lefebure instead, or additionally, challenges an unconstitutional and discriminatory pattern of conduct that contributed to her assault, she has standing to pursue those allegations.

II. Operative Complaint

Though some of Lefebure's allegations sound in failure to prosecute, her complaint does allege a failure to protect caused by Defendant D'Aquilla's underenforcement of the law. We need not, as the majority suggests, recast Lefebure's suit to reach this conclusion. Indeed, she expressly addressed the dividing line for these claims in a brief filed in the district court:

> Defendant mischaracterizes Plaintiff's claims as asserting a right to have Boeker criminally prosecuted and/or convicted. . . .
>
> But, Plaintiff is not claiming a right to have Boeker prosecuted or convicted, she claims no more than what the Fifth Circuit has recognized for more than a decade, that where a law enforcement policy, practice, or custom provides less protection to victims of domestic violence, including rape and sexual assault, such a custom unconstitutionally violates the right to equal protection where discrimination against a specific class was a motivating factor and the plaintiff was injured

> by the policy, custom, or practice. *Shipp P. McMahon*, 234 F.3d 907, 914 (5th Cir. 2000).
> . . .

The district court agreed that Lefebure's allegations sounded in failure to protect, noting the "distinction" between the *Shipp* cases and failure-toprosecute claims like *Linda R.S. See Lefebure P. Boeker*, 390 F. Supp. 3d 729, 747-48 (M.D. La. 2019). After reviewing both lines of precedent, the court concluded that it "d[id] not view Plaintiff's claim as one demanding the prosecution of her alleged attacker. Rather, Plaintiff's claim is that the Defendants have an implied policy or custom to not properly investigat[e] claim[s] of sexual assault by women which violates their official duties to protect the public equally." *Id.* at 747.

And Lefebure's operative complaint directly alleges how the failure of the district attorney's office to protect women violated her equal protection rights. She alleges, for example, that:

> D'Aquilla has "a history of discriminating against women . . . [and has] failed to investigate or take seriously reports of sexual assault from women and generally treat[ed] these allegations with less priority than other crimes."
>
> D'Aquilla's office "does not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing."
>
> D'Aquilla "created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault, which are disproportionately women, by failing to investigate sexual

> assault crimes, [and] by fostering an environment whereby perpetrators of sexual assault are allowed to prey on victims without fear of investigation."

Lefebure also alleges that her rapist "knew of Defendant D'Aquilla's longstanding refusal to properly investigate sexual assault crimes against women" and that this emboldened him to rape her. These allegations—that the district attorney had a policy of not prosecuting sex crimes against women and that Lefebure's rapist knew about the policy (a plausible allegation since he worked in law enforcement)—support a classic failure-to-protect claim.

This conclusion is not premised on abstract or conjectural causation, and to the extent the majority relies on *Linda R.S.* to argue as such, I respectfully disagree. In *Linda R.S.*, appellant "made no showing that her failure to secure support payments result[ed] from the nonenforcement, as to her child's father" of the challenged law. 410 U.S. at 618. Under the Texas statute, even if the law was properly enforced, it would result in the child's father being incarcerated, not actual payment of child support. Thus, the Supreme Court found only a speculative—not direct—relationship between the injury and the claim sought to be adjudicated.

In contrast, Lefebure concretely alleges that Defendant D'Aquilla's known failure to properly investigate sexual assault crimes against women led to her assault. Lefebure explains that after the attack, she saw for herself the allegedly discriminatory enforcement practices that allegedly led to her rape: the district attorney's office did not pick up her rape kit for months and failed to present it to the grand

jury; no one from the office spoke to her about the crime; and D'Aquilla failed to call relevant witnesses to testify before the grand jury.[3] Lefebure's injuries are, at minimum, "fairly . . . trace[able]" to Defendant D'Aquilla's alleged failure to investigate. *See Lujan P. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon P. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Causation need only be "logical." *Linda R.S.*, 410 U.S. at 618. It appears, however, that the majority holds Lefebure to a higher standard.

The bigger point is that even if some of Lefebure's allegations are unviable failure-to-prosecute claims, the others I have noted describe a failure to protect. As the district court highlighted, Lefebure alleges a "long-standing" pattern of discrimination that played a role in her harm. *Id.* at 745-46. Lefebure has maintained from the beginning that the district attorney's history of treating sexual assaults reported by women as less of a priority than other crimes "foster[ed] an environment whereby perpetrators of sexual assault [were] allowed to prey on victims," including herself. She thus articulates a failure-to-protect injury that we have recognized for at least twenty years—and one that invokes the original concerns of the Equal Protection Clause.

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[3] As the majority points out, Lefebure's pleadings also refer to her attacker "not be[ing] held accountable for his actions" and being "protect[ed] . . . from prosecution." But these allegations can be read not to argue for Boeker's prosecution but to illustrate D'Aquilla's underenforcement of rape crimes. That is how the district court understood her claims. *Lefebure*, 390 F. Supp. 3d at 747.

III. Origins of the Equal Protection Clause

Although courts first recognized failure-to-protect claims in the 1980s, *see Shipp*, 234 F.3d at 912, the seeds of these claims were sown more than a century earlier. As its words indicate, the Equal Protection Clause recognizes a right to equal enforcement of the law that encompasses equal *protection* for crime victims. "'Protection of the laws' is, after all, a peculiar way to express a general freedom from discrimination," DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 349 (1985), and the language reflects that "achieving equal protection against lawbreakers was at the core of the Clause's objectives." Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 70 (2003).

As a leading criminal law scholar explained: "When the Fourteenth Amendment's guarantee of the 'equal protection of the laws' was enacted, one of its chief goals was to ensure that criminal law meant one law alike for blacks and whites—that both ex-slaves and ex-slaveowners would be held to the same legal standards, and that crime victims among both groups received roughly the same measure of legal protection." WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 6 (2011). Judge Easterbrook succinctly described the Clause's "original meaning": "[I]f the police and prosecutors protect white citizens, they must protect black citizens too." *Del Marcelle P. Brown Cnty. Corp.*, 680 F.3d 887, 901 (7th Cir. 2012) (en banc) (Easterbrook, C.J., concurring). Likewise, Professor Currie has observed that the equal protection was originally understood "to mean that the states must protect blacks to the

same extent that they protect whites: by punishing those who do them injury." CURRIE, *supra*, at 349.

Congressional debates from the Fourteenth Amendment's passage reveal this original understanding of equal protection. Congressman Thaddeus Stevens, co-chair of the Joint Committee on Reconstruction, noted that the Clause would ensure that "[w]hatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Another member of the Committee, Senator Jacob Howard, remarked that the Clause "gives the humblest, the poorest, the most despised of the race . . . the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766. Failure-to-protect claims based on discriminatory enforcement of the law therefore touch on the original concern of equal protection.[4]

This protection-centered understanding of the Clause has informed courts' approaches to modern cases involving discriminatory police practices. As one court put it, the "selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection

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[4] The majority opines that any plaintiff could simply replead every failure-to-prosecute claim as a failure-to-protect claim. Maj. Op. at 21. This red herring conflates the requirements of plausibly alleging a claim and establishing a basis for standing. A failure-to-protect claim would still be subject to the standing requirements of injury, causation, and redressability. *See Lujan*, 504 U.S. at 560-61. And most failure-to-protect claims arise in the context of a protected category—a scenario that does not always apply.

to their black citizens, is the prototypical denial of equal protection." *Hilton P. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) (citing *Slaughter–House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872); CURRIE, *supra*, at 349); *see also Del Marcelle*, 680 F.3d at 889 (Posner, J.) (describing "law enforcers who systematically withdraw protection from a group against which they are prejudiced" as "the original target of the equal protection clause"); *Mody*, 758 F. Supp. at 1028 ("An express or implied policy which permits or condones attacks upon members of a particular minority group is the very evil which the post-Civil War statutes sought to eradicate.").

IV. Conclusion

Lefebure raises that prototypical equal protection claim, centered on the injuries she alleges resulted from a discriminatory failure to enforce the law when it comes to rape cases. A right to be free from discriminatory law enforcement policies that enable crime is distinct from an affirmative right to prosecution. As the injury Lefebure asserts is one caused by a policy of discrimination, it implicates the chief original concern of equal protection. This is an injury she has standing to vindicate.

For these reasons, Lefebure has alleged the type of failure-to-protect claim that has long been cognizable. Such claims guard against the dangerous and discriminatory underenforcement of the law based on a victim's status. Although it might be difficult for Lefebure to ultimately prove on the merits that the district attorney's policy, custom, or practice played a role in her assault, she does have standing to pursue such a claim. Accordingly, I dissent.

APPENDIX C: JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 5, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRISCILLA LEFEBURE, AN INDIVIDUAL,

Plaintiff-Appellee,

v.

SAMUEL D'AQUILLA, 20TH JUDICIAL DISTRICT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY,

Defendant-Appellant.

No. 19-30702 CONSOLIDATED WITH No. 19-30989

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:17-CV-1791

ON PETITION FOR REHEARING EN BANC

Before: OWEN, Chief Judge, and GRAVES and HO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party to bear own costs on appeal to be taxed by the Clerk of this Court.

APPENDIX D:
RULING AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA (JUNE 25, 2019)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRISCILLA LEFEBURE,

v.

BARRETT BOEKER, ASSISTANT WARDEN LOUISIANA STATE PENITENTIARY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, WEST FELICIANA PARISH, SAMUEL D. D'AQUILLA, 20TH JUDICIAL DISTRICT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DISTRICT ATTORNEY, J. AUSTIN DANIEL, SHERIFF, WEST FELICIANA PARISH, INSURANCE CO. DOES 1-5, DOES 6-20,

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Civil Action 17-1791-SDD-EWD

Before: Shelly D. DICK, Chief Judge, United States District Court.

This matter is before the Court on the *Motion to Dismiss*[1] filed by Defendant, Samuel C. D'Aquilla, individually and in his official capacity as District Attorney for the 20th Judicial District, State of

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[1] Rec. Doc. No. 57.

Louisiana ("Defendant" or "the DA"), pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff, Priscilla Lefebure ("Plaintiff" or "Lefebure"), filed an *Opposition*[2] to this motion, to which Defendant filed a *Reply*.[3] The Court heard Oral Argument on this motion on March 25, 2019, and granted in part and denied in part the DA's motion, with detailed written reasons to be assigned.[4] For the reasons which follow, the Court has granted in part and denied in part the DA's motion.

I. Background

Plaintiff filed a *Complaint*[5] and *First Amended Complaint*[6] seeking relief under 42 U.S.C. § 1983 and § 1985 and under Louisiana law against Barrett Boeker ("Boeker"), Assistant Warden at the Louisiana State Penitentiary, individually and in his official capacity, West Feliciana Parish;[7] Samuel C. D'Aquilla, District Attorney for the 20th Judicial District, individually and in his official capacity; J. Austin Daniel,

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[2] Rec. Doc. No. 70.

[3] Rec. Doc. No. 74.

[4] Rec. Doc. No. 81. The Court also reserved the right to "reconsider, modify, and/or supplement the oral reasons" assigned from the bench.

[5] Rec. Doc. No. 1.

[6] Rec. Doc. No. 37.

[7] Defendant, Barrett Boeker, also filed a motion to dismiss pursuant to Rule 12(b)(6), or alternatively, motion for more definite statement pursuant to Rule 12(e). Rec. Doc. No. 51. Boeker's motion to dismiss is not addressed in the instant Ruling and Order will be addressed by separate Ruling and Order.

Sheriff, West Feliciana Parish ("Sheriff Daniel"); and various unknown insurance companies and unknown defendants.

At the outset, the Court recognizes that the allegations set forth in Plaintiff's *Complaint* and *First Amended Complaint* are disturbing and presented in vivid detail. At this stage of the matter, this Court is charged with accepting the pled facts as true. The Court also notes that this matter, as pled, is factually unique to the body of cases implicated by the alleged claims, defenses, and the instant motion. While the claims, defenses, and arguments raised are not new to this Court, the law as applied to the facts alleged is largely uncharted in this Circuit.

Plaintiff claims that, on December 1, 2016, Boeker raped her at his home on the grounds of the Louisiana State Penitentiary.[8] Plaintiff claims that Boeker sexually assaulted her a second time on December 3, 2016.[9] Plaintiff had a rape kit administered and completed on December 8, 2016, at Woman's Hospital in Baton Rouge.[10] Plaintiff alleges that the report on the rape kit noted bruising in the pattern of fingers and hand prints and a red, irritated cervix. Photographs were taken.[11] Plaintiff pleads disturbing facts and circumstances of the alleged rape and

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[8] Rec. Doc. No. 37, p. 1, ¶ 1.

[9] Rec. Doc. No. 37, p. 1, ¶ 2.

[10] Rec. Doc. No. 37, p. 2, ¶ 3.

[11] Rec. Doc. No. 37, p. 2, ¶ 4.

sexual assault, the rape kit findings, and her alleged damages.[12]

Boeker was arrested for second degree rape on December 20, 2016; however, he was never indicted or convicted.[13] Plaintiff alleges she was denied equal protection and due process under the law as a result of the failure of the DA and Sheriff Daniel to investigate Boeker's alleged crimes and obtain the rape kit, which Plaintiff claims demonstrates a conspiracy to protect Boeker. Plaintiff also claims her constitutional right have been violated by the DA and Sheriff Daniel's alleged policy of disproportionate treatment of women and sexual assault victims.

Prior to the grand jury hearing, Plaintiff avers that neither the DA nor Sheriff Daniel requested, picked-up, or examined her rape kit.[14] Thus, the rape kit along with the photographic evidence contained therein did not become a part of the DA's investigative file and was never presented to the grand jury. Plaintiff also claims that, prior to the grand jury hearing, the DA did not interview or speak to Plaintiff because, according to DA in a public statement, he was "uncomfortable" doing so.[15] Plaintiff further claims that the DA marked up his file copy of the police report to point out purported discrepancies in Plaintiff's description of the events and pointedly noted "plead 5th" on the police report.[16] Because it comprised part

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[12] Rec. Doc. No. 37, pp. 1-7 and 10-16.

[13] Rec. Doc. No. 37, p. 2, ¶ 5.

[14] Rec. Doc. No. 37, p. 3, ¶ 9.

[15] Rec. Doc. No. 37, p. 3, ¶ 11.

[16] Rec. Doc. No. 37, p. 3, ¶ 10.

of the DA's investigatory file, the annotated and underlined police report was presented to the grand jury. Plaintiff also alleges that the DA colluded with the Sheriff to not investigate her rape claim.[17] The gravamen of the Plaintiff's *Complaint* is that the DA worked in concert with the Sherriff to significantly curtail the thoroughness of the investigative process in order to manipulate the grand jury outcome.

On December 21, 2017, Plaintiff filed this action against Boeker, the DA, and Sheriff Daniel seeking to hold them individually and jointly liable for damages

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[17] Additional allegations and details are alleged in support Plaintiff's claims, such as: Defendant claimed that there were no photos or cooperative witnesses available for the grandy jury hearing, but Plaintiff pleads that there were photos with the rape kit and numerous corroborating witnesses; the issue at the grand jury hearing, according to Defendant, was credibility, and Defendant determined without ever speaking to Plaintiff that he did not believe her; Defendant did not believe that the rape kit was necessary because Boeker said that Plaintiff consented to the alleged sexual acts, yet Plaintiff maintained at all times that she did not consent; witnesses agree that rape kits are the "linchpins" to a proper investigation of sexual assault allegations; Defendant's policy is to present everything in his file to the grand jury, but there was no mandate to request the rape kit and make it part of the file (suggesting an intentional design of a file void of evidence); all Defendants conspired from the time of Boeker's arrest to not investigate or prosecute Boeker for the charges; Boeker's wife is Plaintiff's cousin, and she told Plaintiff that Boeker has committed these same acts in the past; Boeker's counsel is a relative of District Attorney D'Aquilla; Boeker was the Assistant Warden of the Louisiana State Penitentiary at the time, living in a house on the premises; on the night Boeker was arrested, he, his counsel, both Defendants, and the Warden met, and it was determined that Boeker would be given preferential treatment and serve no jail time; Defendants colluded in the decision to not investigate the claims. Rec. Doc. No. 37, ¶¶ 1-34 and 50-87.

resulting from the alleged rape, sexual assault, and what Plaintiff alleges as the lack of investigation into her criminal complaints against Boeker. Plaintiff also seeks declaratory and injunctive relief.[18] In Plaintiff's *Amended Complaint*,[19] Plaintiff asserted the following causes of action adverse to the following Defendants: (1) violation of the 14th Amendment (Equal Protection) under 42 U.S.C. § 1983 and Louisiana Constitution Article I, Section 3 (Right to Individual Dignity) adverse to District Attorney D'Aquilla and Sheriff Daniel in their individual and official capacities;[20] (2) violation of the 14th Amendment (Substantive Due Process) under 42 U.S.C. § 1983 and Louisiana Constitution Article I, Section 2 (Due Process) adverse to District Attorney D'Aquilla and Sheriff Daniel in their individual and official capacities;[21] (3) Civil Conspiracy to violate civil rights under 42 U.S.C. §§ 1983 and 1985 adverse to all Defendants;[22] (4) Abuse of Process under 42 U.S.C. § 1983 adverse to all Defendants;[23] (5) Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Assault, Battery, False Imprisonment, Rape, and Sexual Battery under Louisiana State Law adverse to Defendant Boeker;[24] and (6) Direct Action Claims

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[18] Rec. Doc. No. 1, pp. 22-23, ¶ 128.

[19] Rec. Doc. No. 37.

[20] Rec. Doc. No. 37, pp. 16-19, ¶¶ 88-103.

[21] Rec. Doc. No. 37, pp. 19-20, ¶¶ 104-116.

[22] Rec. Doc. No. 37, pp. 21-22, ¶¶ 117-126.

[23] Rec. Doc. No. 37, p. 22, ¶¶ 127-132.

[24] Rec. Doc. No. 37, p. 23, ¶¶ 133-136.

under Louisiana State Law adverse to all Defendant unknown insurance companies.[25]

In the motion before this Court, the DA seeks dismissal of Plaintiff's claims under Rule 12(b)(1) for lack of standing and under Rule 12(b)(6) for failure to state a claim upon which relief may be granted on her substantive federal and state law claims. Plaintiff opposes the Defendant's motion, arguing that she has demonstrated Article III standing, that Defendant is not entitled to any immunity, and she has sufficiently and specifically pled plausible causes of action adverse to Defendant.

II. Law and Analysis

A. Rule 12(b)(1) Motion to Dismiss

"When a motion to dismiss for lack of jurisdiction 'is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.'"[26] If a complaint could be dismissed for both lack of jurisdiction and for failure to state a claim, "the court should dismiss only on the jurisdictional ground under [Rule] 12(b)(1), without reaching the question of failure to state a claim under [Rule] 12(b)(6)."[27]

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[25] Rec. Doc. No. 37, pp. 23-24, ¶¶ 137-142.

[26] *Crenshaw-Logal v. City of Abilene, Texas*, 436 Fed.Appx. 306, 308 (5th Cir. 2011) (quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see also Randall D. Wolcott, MD, PA v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011); Fed.R.Civ.P. 12(h)(3)).

[27] *Crenshaw-Logal*, 436 Fed.Appx. at 308 (quoting *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977)).

The reason for this rule is to preclude courts from issuing advisory opinions and barring courts without jurisdiction "from prematurely dismissing a case with prejudice."[28]

"A motion to dismiss under Rule 12(b)(1) is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6)."[29] Therefore, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff.[30] Ultimately, "[t]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."[31]

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is characterized as either a "facial" attack, *i.e.*, the allegations in the complaint are insufficient to invoke federal jurisdiction, or as a "factual" attack, *i.e.*, the facts in the complaint supporting subject matter jurisdiction are questioned.[32]

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[28] *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and *Ramming*, 281 F.3d at 161).

[29] *Wagster v. Gautreaux*, 2014 WL 3546997, at *1 (M.D. La. July 16, 2014) (quoting *Hall v. Louisiana, et al*, 974 F.Supp.2d 978, 985 (M.D. La. Sept. 30, 2013)) (citing *Benton v. U.S.*, 960 F.2d 19, 21 (5th Cir. 1992)).

[30] *Lewis v. Brown*, 2015 WL 803124, at *3 (M.D. La. Feb. 25, 2015).

[31] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citations omitted).

[32] *In re Blue Water Endeavors, LLC*, Bankr. No. 08-10466, Adv. No. 10-1015, 2011 WL 52525, at *3 (E.D. Tex. Jan. 6, 2011) (citing *Rodriguez v. Texas Comm'n of Arts*, 992 F.Supp. 876,

As in this case, when a defendant files a Rule 12(b)(1) motion without accompanying evidence it is analyzed as a facial attack[33] In a facial attack, allegations in the complaint are taken as true.[34]

B. Rule 12(b)(6) Motion to Dismiss

When deciding a Rule 12(b)(6) motion to dismiss, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff."[35] The Court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[36] "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'"[37] In *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court set forth the basic criteria necessary for a complaint to survive a Rule 12(b)(6) motion to dismiss.[38] "While a complaint attacked by

878-79 (N.D. Tex. 1998), *aff'd*, 199 F.3d 279 (5th Cir. 2000)).

[33] *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

[34] *Blue Water*, 2011 WL 52525, at *3 (citing *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995)).

[35] *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).

[36] *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)).

[37] *In re Katrina Canal Breaches Litigation*, 495 F.3d at 205 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 570 (2007)).

[38] *Bell Atl. Corp. v. Twombly*, 550 U.S. at 544 (hereinafter "*Twombly*").

a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[39] A complaint is also insufficient if it merely "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[40] However, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[41] In order to satisfy the plausibility standard, the plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully."[42] "Furthermore, while the court must accept well-pleaded facts as true, it will not 'strain to find inferences favorable to the plaintiff.'"[43] On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation."[44]

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[39] *Twombly*, 550 U.S. at 555 (internal citations and brackets omitted).

[40] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted) (hereinafter "*Iqbal*") (quoting *Twombly*, 550 U.S. at 557).

[41] *Id.* (citing *Twombly*, 550 U.S. at 556).

[42] Id.

[43] *Taha v. William Marsh Rice Univ.*, 2012 WL 1576099, at *2 (S.D. Tex. May 3, 2012) (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

[44] *Twombly*, 550 U.S. at 555 (quoting *Papassan v. Allain*, 478 U.S. 265, 286 (1986)).

C. Standing

"Article III standing is a jurisdictional prerequisite."[45] If a plaintiff lacks standing to bring a claim, the Court lacks subject matter jurisdiction over the claim, and dismissal under Rule 12(b)(1) is appropriate.[46] The party seeking to invoke federal jurisdiction bears the burden of showing that standing existed at the time the lawsuit was filed.[47] In reviewing a motion under 12(b)(1) for lack of subject matter jurisdiction, a court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.[48]

Article III of the Constitution limits federal courts' jurisdiction to certain "cases" and "controversies." "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[49] "One

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[45] *Crenshaw-Loga*l, 436 Fed.Appx. at 308 (citing *Steel Co.*, 523 U.S. at 101, 118 S.Ct. 1003, and *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 350 (5th Cir. 1989)).

[46] *Whitmore v. Arkansas*, 495 U.S. 149, 154-55, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997).

[47] *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *Ramming*, 281 F.3d at 161.

[48] *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

[49] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (internal quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d

element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue."[50]

Defendant is correct that to establish constitutional standing, "the plaintiff must show that [she] has suffered an 'injury in fact' that is: concrete and particularized and actual or imminent, fairly traceable to the challenged action of the defendant; and likely to be redressed by a favorable decision."[51] However, Defendant contends that "crime victims do not have standing to 'contest the policies of the prosecuting authority when he or she is neither prosecuted nor threatened with prosecution."[52]

Citing *Linda R.S. v. Richard D. and Texas*,[53] the DA argues Plaintiff lacks standing to bring claims against him because she is a "crime victim" who is contesting the DA's "prosecuting authority," and, since Plaintiff is neither the person being prosecuted nor threatened with prosecution, she lacks

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849 (1997) (internal quotation marks omitted); *see, e.g., Summers v. Earth Island Institute*, 555 U.S. 488, 492-493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

50 *Raines*, 521 U.S. at 818, 117 S.Ct. 2312; *see also Summers*, 555 U.S. at 492-493, 129 S.Ct. 1142; *DaimlerChrysler Corp.*, 521 U.S. at 342, 126 S.Ct. 1854; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

51 Rec. Doc. No. 57-1, pp. 4-5 (citing *Lugan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

52 Rec. Doc. No. 57-1, p. 5 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L. Ed. 2d 536 (1977)).

53 *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L. Ed. 2d 536 (1977)

standing to bring these claims.[54] In *Linda*, the plaintiff was the mother of a child born out of wedlock who sought a judgment declaring unconstitutional a Texas criminal statute which provided that a parent who fails to support his/her children is subject to prosecution. The plaintiff challenged the statute because it only applied to parents of children born of marriage. She also sought an injunction forbidding the district attorney from declining to prosecute the biological father of her child simply because they were unmarried. The case was dismissed for lack of standing on the nexus prong. The Supreme Court found that the plaintiff had "an interest in the support of her child" and suffered an injury, *i.e.*, lack of payment of child support without a legal mechanism to enforce payment. However, the Court ruled that the plaintiff could not show the second prong of the standing requirement, namely, a "direct nexus" between her injury and the government action which she attacked.[55] The Supreme Court explained:

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[54] *Id.*

[55] *Linda R.S.*, 410 U.S. at 617-18. "To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. 'The party who invokes (judicial) power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of (a statute's) enforcement.'" *Linda R.S.*, 410 U.S. at 618 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923)). "Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. . . . Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father." *Linda R.S.*, 410 U.S. at 618.

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. *See Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 512 (1962); *Poe v. Ullman*, 367 U.S. 497, 501, 81 S.Ct. 1752, 1754, 6 L.Ed.2d 989 (1961). Although *these cases arose in a somewhat different context*, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant *does* have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a *direct nexus* between the vindication of her interest and the enforcement of the State's criminal laws.[56]

In *Linda*, the Supreme Court pragmatically recognized that the plaintiff lacked a nexus between her injury/interest (support for her child) and enforcement of the law at issue because enforcement would likely place the father in jail unable to pay the child support that she was ultimately seeking.[57]

Turning to the present case, neither Plaintiff nor Defendant directed the Court to Fifth Circuit juris-

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[56] *Linda R.S.*, 410 U.S. at 619 (emphasis added).

[57] *Id.*

prudence supporting a finding that the Plaintiff lacks standing in this matter. Likewise, the Court did not identify Fifth Circuit jurisprudence pertinent to the issue of standing under similar factual circumstances. The DA cites the Eighth Circuit's decision in *Parkhurst v. Tabor*[58] which relies upon *Linda*. In *Parkhurst*, the biological mother and adoptive father of a minor child asserted claims under Section 1983 against Arkansas state prosecutors and the county, alleging a violation of their child's right to equal protection under the Fourteenth Amendment based on the prosecutors' decision to forego prosecution of the child's biological father for sexual assault of the child. The Western District of Arkansas granted the prosecutor's Rule 12 motion. The Eighth Circuit Court of Appeals affirmed, holding that the plaintiffs did not suffer an injury in fact and therefore lacked standing.

In its analysis, the Eighth Circuit cited to *Linda*, stating: "[C]rime victims have standing to challenge allegedly discriminatory prosecutorial conduct only if those victims have a constitutional right to the nondiscriminatory prosecution of crime such that its deprivation constitutes injury in fact."[59] Notably, the *Parkhurst* court specifically recognized that "crime victims have standing" where there is a showing that the allegedly discriminatory treatment implicates the protections of the Fourteenth Amendment.[60]

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58 569 F.3d 861, 866 (8th Cir. 2009).

59 *Parkhurst*, 569 F.3d at 865 (citing *Linda*, 410 U.S. at 617).

60 *Id.*

Next, the *Parkhurst* court drew a distinction between crime victims who have standing to bring claims based on the alleged "failure to protect" rather than the alleged "failure to prosecute":

> The Parkhursts point to several cases where crime victims were determined to have a right to challenge the allegedly discriminatory provision of police protection. *See, e.g., Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.Conn.1984). In *Macias*, family members of a slain woman brought a § 1983 suit alleging that police officers had ignored repeated complaints of threatened violence and provided 'inferior police protection' because the decedent was a member of a disfavored class of victims, thereby violating the Equal Protection Clause. 219 F.3d at 1019. The Ninth Circuit concluded, without reaching the merits, that '[t]here is a constitutional right [] to have police services administered in a nondiscriminatory manner – a right that is violated when a state actor denies such protection to disfavored persons.' *Id.* at 1028. When faced with a similar allegation of discriminatory police protection, the district court in Thurman determined that '[p]olice action is subject to the equal protection clause and section 1983 whether in the form of commission of violative acts or omission to perform required acts pursuant to the police officer's duty to protect.' 595 F.Supp. at 1527.

> The Parkhursts claim to have been injured by a failure to prosecute Belt rather than by a failure to provide police protection to H.P., and they point to no cases which have recognized a right to compel prosecution of a wrongdoer. *That the standing analysis differs depending on whether the alleged injury arises from a failure to prosecute or a failure to protect is not without rationale. While police officers are under a 'statutorily imposed duty to enforce the laws equally and fairly*,' . . . '[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.'[61]

In the Court's view, the Plaintiff's claims in the instant matter against the DA are not for his failure to prosecute Boeker. Plaintiff may claim that the alleged failure to fully investigate was motivated by a preference in the prosecutorial outcome, but the Plaintiff does not assert the prosecutorial outcome as her injury. Rather, Plaintiff seeks relief for the failure to investigate her claims, for the alleged conspiracy with the Sheriff not to investigate her claims, and for the alleged long-standing practice, policies and procedures that fostered the failure to investigate resulting in a discriminatory impact upon sexual assault victims and women in violation of the Equal Protection and Due Process Clauses.[62]

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61 *Parkhurst*, 569 F.3d at 866-67 (emphasis added).

62 Rec. Doc. No. 37, *supra.*

The DA also relies on *Doe v. Pocomoke City*.[63] In *Doe*, female victims of sexual assaults brought suit against city officials and the county attorney, alleging civil rights violations in connection with their failure to properly investigate and refusal to prosecute sex crimes. The claims were dismissed for lack of standing. The plaintiffs in *Doe* did not complain about any specific sexual assault on themselves or the alleged failure of the criminal process as to themselves. Rather, *Doe* involved plaintiffs as interested citizens, albeit prior victims, coming forward to urge the investigation and prosecution in a sexual assault matter that was completely unrelated to them. The court in *Doe*, relying upon *Linda*, found that the plaintiffs lacked standing as they failed to demonstrate an injury in fact and nexus.[64]

Doe is also distinguishable from the case before the Court. Here, Plaintiff has alleged a particularized injury "fairly traceable" to, and allegedly as a result of, the alleged actions or inactions of the DA, individually and in concert with Sheriff Daniel. Plaintiff has not filed suit as an "interested citizen" seeking generalized relief. Plaintiff claims that the DA refused to request, retrieve, and examine her rape kit as part of his investigation; thus, the rape kit never became a part of the prosecutor's file.[65] Plaintiff alleges that this was intentional and part of a broader conspiracy and plan to protect Boeker, a fellow law enforcement

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[63] 745 F.Supp.1137 (D.Md. 1990).

[64] Doe, 745 F.Supp. at 1139-40.

[65] Rec. Doc. No. 37, ¶¶ 9 and 27.

officer.[66] She further claims the DA conspired with all Defendants and agreed not to investigate her rape complaint to ultimately protect Boeker from prosecution.[67] According to Plaintiff, the DA's actions or inactions, protocol and procedures, disproportionately affect female sexual assault victims generally and violated her equal protection rights, specifically.[68] In other words, Plaintiff claims the DA's intentional acts in this case and the DA's policies and procedures create the danger of an increased risk of harm to Plaintiff and other victims of sexual assault who are disproportionately women.[69] She further alleges a "long-standing refusal" to investigate sexual assault crimes against women and/or female-identified individuals.[70] In fact, Plaintiff pleads a "history" of the DA's discrimination against women.[71] Plaintiff alleges that the DA implemented "long-standing" and "historical" policies and procedures that violated her equal protection rights.[72] As a result of the alleged conduct of the DA, Plaintiff alleges detailed mental and physical damages she has sustained.[73]

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[66] Rec. Doc. No. 37, ¶¶ 77-87.

[67] Rec. Doc. No. 37, ¶¶ 77-87.

[68] Rec. Doc. No. 37, ¶¶ 88-103.

[69] Rec. Doc. No. 37, ¶¶ 90-95.

[70] Rec. Doc. No. 37, ¶ 96.

[71] Rec. Doc. No. 37, ¶ 98.

[72] Rec. Doc. No. 37, ¶¶ 99-102.

[73] Rec. Doc. No. 37, pp. 24-25, ¶ 143 ("conscious and severe physical, mental, and emotional distress, and pain and suffering; economic and other monetary injury including, but not limited

Plaintiff also claims that ignoring the existence of her rape kit constitutes a taking of her property and a violation of her substantive due process rights.[74] Plaintiff claims a constitutional property right in her rape kit and further claims that the DA ignoring her rape kit and failing to present it to the grand jury constitutes a "taking" without substantive due process. Plaintiff claims that the complete failure to investigate, including the failure to request the rape kit and have it tested, deprived her of her due process rights to have her alleged crime properly investigated.[75] Plaintiff further claims the Defendants' conspiracy to protect Boeker from prosecution resulted in the violation of her rights to equal protection under the law and substantive due process.[76]

On the face of the *Complaint* and *First Amended Complaint*, the Court finds that Plaintiff has alleged an injury and interest particular to her and a nexus between her injury/interest and the claims against the DA. As set forth above, there is jurisprudential

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to, loss of earnings, loss of work prospects, loss of future income, and loss of past income; and, any other such damage cognizable under these laws and statutes and provable at trial").

[74] Rec. Doc. No. 37, ¶¶ 84, 92, and 104-116. Plaintiff contends a policy requiring collection and examination of rape kits would have prevented her injuries and seeks: a declaratory judgment that it is unconstitutional to allow rape kits and examinations to go without review; injunctive relief enjoining the Defendants from acting in concert in violation of the Constitution; a plan that will require the Sheriff and the DA to collect and review rape kits and present them as evidence; and compensatory and punitive damages. Rec. Doc. No. 37, pp. 25-26, ¶ 144.

[75] Rec. Doc. No. 37, ¶¶ 84, 92, and 104-116.

[76] Rec. Doc. No. 37, ¶¶ 117-126.

support for the finding the Plaintiff has standing based on the alleged violation of the Equal Protection Clause. The Court will discuss the viability of the alleged constitutional violations in greater detail below. Accordingly, the Court denies the DA's *Motion to Dismiss* under Rule 12(b)(1) for lack of standing.

D. 42 U.S.C. § 1983 Claims

"Section 1983 imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.'"[77] In order to state a claim under 42 U.S.C. § 1983, the plaintiff must establish two elements: "(1) that the conduct in question deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the conduct complained of was committed by a person acting under color of state law."[78] As for the first element, 42 U.S.C. § 1983 only imposes liability for violations of rights protected by the United States Constitution–not for violations of duties of care arising out of tort law.[79] As to the second element, a "plaintiff must identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged."[80]

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[77] *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

[78] *Jones v. St. Tammany Parish Jail*, 4 F.Supp.2d 606, 610 (E.D. La. May 8, 1998); *Elphage v. Gautreaux*, 2013 WL 4721364, at *5 (M.D. La. Sept. 3, 2013).

[79] *Griffith v. Johnston*, 899 F.2d 1427, 1436 (5th Cir. 1990).

[80] *Woods v. Edwards*, 51 F.3d 577, 583 (5th Cir. 1995).

"The performance of official duties creates two potential liabilities, individual-capacity liability for the person and official-capacity liability for the municipality."[81] Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. However, to be liable in one's official capacity under Section 1983, the defendant must have been delegated policy-making authority under state law. In contrast, a state actor may have Section 1983 liability in his/her individual capacity for actions causing the deprivation of a federal right taken under color of state law.[82]

The DA has been sued under Section 1983 in both his individual and official capacities. There appears to be no dispute that the DA was acting "under color of law" in his alleged conduct. The Court turns to a consideration of whether Plaintiff has satisfied the first requirement to state a claim under Section 1983, namely to state a claim of a constitutional violation.

1. Constitutional Violations Alleged

a. Equal Protection Clause

The DA maintains Plaintiff has not stated a claim for an equal protection violation and cites to a decision from the District of Maryland, *Doe v. Pocomoke City*, wherein the court held that women who were victims of alleged sexual assault lacked standing to bring a claim against the town's Mayor and the

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81 *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 484 (5th Cir. 2000).

82 *Coleman v. East Baton Rouge Sheriff's Office*, 2014 WL 5465816, at *3 (M.D. La. Oct. 28, 2014).

State's attorney alleging those parties deliberately failed to properly investigate and prosecute sex crimes.[83] The DA also cites the Supreme Court's decision in *Linda R.S. v. Richard D.*, wherein the Court held that crime victims lack standing to "contest the polices of the prosecuting authority when he [or she] is neither prosecuted nor threatened with prosecution."[84]

The Court does not view Plaintiff's claim as one demanding the prosecution of her alleged attacker. Rather, Plaintiff's claim is that the Defendants have an implied policy or custom to not properly investigation claim of sexual assault by women which violates their official duties to protect the public equally. More recent jurisprudence recognizes this distinction.

The Fourteenth Amendment states "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[85] "[E]ssentially . . . all persons similarly situated should be treated alike."[86] To plead such a claim, "a plaintiff typically alleges that [s]he 'received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'"[87] To state a claim under the Equal

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[83] 745 F.Supp. 1137 (D. Md. 1990).

[84] 410 U.S. 614, 619 (1977).

[85] U.S. Const. amend. XIV, § 1.

[86] *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 212 (5th Cir. 2009) (citing *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993)) (internal quotations and additional citations omitted).

[87] *Id.* at 212-13 (citing *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001)).

Protection Clause, a § 1983 plaintiff must either allege that (a) "a state actor intentionally discriminated against [her] because of membership in a protected class," or (b) [s]he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[88]

In *DeShaney v. Winnebago County Dept. of Soc. Servs.*, the Supreme Court held that the "Due Process Clause does not require a State to provide its citizens with particular protective services."[89] At the same time, however, *DeShaney* noted that "a State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[90] The Fifth Circuit stated: "this court acknowledged that certain intentionally discriminatory policies, practices, and customs of law enforcement with regard to domestic assault and abuse cases may violate the Equal Protection Clause under the *DeShaney* footnote."[91] While granting qualified immunity on the facts then before the court, *Shipp* provided an objective standard to inform government officials of the type of conduct that violates federal constitutional or statutory rights.[92] To sustain

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88 *Gibson v. Tex. Dep't of Ins.*, 700 F.3d 227, 238 (5th Cir. 2012) (internal citations omitted).

89 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

90 *Id.* at 197 n. 3, 109 S.Ct. 998.

91 *Beltran v. City of El Paso*, 367 F.3d 299,304 (citing *Shipp v. McMahon*, 234 F.3d 907, 914 (5th Cir. 2000), overruled in part on other grounds by, *McClendon*, 305 F.3d at 328-29).

92 *Id.* (citing *Shipp* at 914 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982))).

a gender-based equal protection challenge under *Shipp*, a plaintiff must show "(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom or practice."[93] In *Village of Willowbrook v. Olech*, the Supreme Court held that the Equal Protection Clause can give rise to a cause of action on behalf of a "class of one," even when the plaintiff does not allege membership in a protected class or group.[94] To state a class of one equal protection claim, a plaintiff must offer a comparator she contends is similarly situated, but treated more favorably for no rational purpose.[95]

The Court finds that Plaintiff has alleged a cognizable Equal Protection claim. However, although Plaintiff presented argument on the DA's individual liability for this claim at the oral argument, Plaintiff failed to address the DA's individual liability for an Equal Protection violation in her *Opposition*; specifically, Plaintiff failed in her written *Opposition* to

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93 *Shipp*, 234 F.3d at 914.

94 *See Village of Willowbrook v. Olech*, 528 U.S. 562, 563-564 (2000) (finding the plaintiffs properly alleged they had been treated differently from other similarly situated property owners); *Gil Ramirez Grp., LLC v. Houst. Indep. Sch. Dist.*, 786 F.3d 400, 419 (5th Cir. 2015) (explaining that an equal protection claim depends on either identifying a class or showing that the aggrieved party is a "class of one").

95 *Monumental Task Comm., Inc. v. Foxx*, No. 15-6905, 2016 WL 5780194, at *3 (E.D. La. Oct. 4, 2016) (citing *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007)) (emphasis added).

respond to the DA's assertion of qualified immunity for the equal protection individual capacity violation Plaintiff asserted. In keeping with the Court's comments at oral argument, Plaintiff will be allowed to amend her *Complaint* on this issue and will be ordered to file a Rule 7(a) Response to the DA's assertion of qualified immunity.

Many of Plaintiff's Equal Protection allegations implicate official capacity liability, and the Court will discuss this claim in greater detail below.

b. Due Process Clause – Access to the Courts

Plaintiff alleged in her *Complaints* that the failure to obtain and process her rape kit constituted a "taking" under the Due Process Clause. However, Plaintiff abandoned this claim in her *Opposition* by failing to argue it and focused her Due Process claim instead on the alleged denial of her right of access to the courts allegedly caused by the DA's conduct, which she claims impeded her ability to receive benefits under the Louisiana Victim Compensation Fund ("LVCF"), which Plaintiff contends is the unconstitutional deprivation of a property interest. However, in *Carter v. State, Crime Victims Reparations Bd. and Fund*,[96] the Louisiana First Circuit Court of Appeal held that no property interest is created by the Louisiana Victims Reparations Act:

> The Louisiana Victims Reparations Act does not require the granting of applications for reparations upon the mere fulfillment of "certain specified qualifications." *See Hagood*,

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96 2003-2728 (La. App. 1 Cir. 10/29/04), 897 So.2d 149.

> 385 So.2d at 409. Rather, the act allows the board wide discretion in its decision on awards. Under the law, the board considers the application using a preponderance of the evidence standard of review. La. R.S. 46:1809 A. The initial consideration is whether a pecuniary loss was sustained. *Id.* Secondly, the board must make ancillary findings, including the victim's level of cooperation with law enforcement and level of involvement in the crime itself. La. R.S. 46:1809 B. *Thus, reparations are a remedy or a benefit granted by the state, but not an entitlement*. Absent a protected property interest, a due process notice and hearing were not required. *See Hagood*, 385 So.2d at 409.[97]

A benefit does not give rise to a constitutionally protected property interest. Plaintiff acknowledges the holding of *Carter* but urges the Court to ignore it, arguing that it is erroneous considering the mandatory language of the statute.

The Court is not inclined to overrule *Carter* in this case. Indeed, "[w]here the state's highest court has not yet spoken on an issue, the federal district court may look to the state's appellate courts for guidance."[98] Further, the United States Supreme Court has held that a decision by an intermediate appellate state court should not be disregarded by a federal court unless it is convinced by other persuasive data that

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97 *Id.* at 151-52 (emphasis added).

98 *TS & C Investments, L.L.C. v. Beusa Energy, Inc.* 637 F.Supp.2d 370, 374 (W.D. La.2009) (citations omitted).

the highest court of the state would decide otherwise.[99] Considering the principles of federalism and comity as set forth in both the *Rooker-Feldman* doctrine[100] and the *Younger* abstention doctrine,[101] the Court declines to grant the relief Plaintiff requests. Any challenge to the constitutional scope and interpretation of a state statute should be made through the state court system before seeking relief from a federal district court. Accordingly, Plaintiff has failed to state a claim under Section 1983 for a Due Process Clause violation based on the alleged denial of access to the Louisiana Victim Compensation Fund.

c. Abuse of Process

Plaintiff appears to allege an abuse of process claim under Section 1983 and under state tort law.[102] However, Plaintiff's *Opposition* addresses her abuse

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[99] *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

[100] The *Rooker Feldman* doctrine "holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Union Planters Bank Nat. Ass'n v. Salih*, 369 F.3d 457, 462 (5th Cir. 2004) (citation omitted).

[101] *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971). Further, the "*Younger* abstention also allows federal courts to avoid interpreting state laws that would result in the unwarranted determination of federal constitutional questions." *Health Net, Inc. v. Wooley*, 534 F.3d 487, 495 (5th Cir. 2008) (citations and internal quotation marks omitted).

[102] Rec. Doc. No. 37, p. 22, ¶¶ 127-132. Plaintiff's Fourth Cause of Action alleges Abuse of Process under Section 1983; however, in ¶ 128, she alleged that Defendants are liable for "the state tort of abuse of process." In ¶ 129, Plaintiff alleges that the Defendants acted in a manner violative of her "state and federal constitutional rights."

of process claim only in the context of state tort law. Thus, the Court will not consider Plaintiff's abuse of process claim as a federal constitutional claim brought under Section 1983.

2. Absolute Immunity – Individual Capacity Claims

The United States Supreme Court has adopted a "functional approach" to the question of absolute immunity, one that looks to "the nature of the function performed, not the identity of the actor who performed it."[103] A prosecutor is immune for initiating and pursuing a criminal prosecution. Specifically, a prosecutor is absolutely immune when he[104] acts in his "role as advocate for the State,"[105] or when his conduct is "intimately associated with the judicial phase of the criminal process."[106] However, a prosecutor does not enjoy absolute immunity for acts of investigation or administration.[107] Even if a prosecutor fails to show absolute immunity for a given activity, he may still show qualified immunity.[108]

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[103] *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976).

[104] The male pronoun will be used herein for convenience.

[105] *Burns v. Reed*, 500 U.S. 478, 491, 111 S.Ct. 1934, 1942, 114 L.Ed.2d 547 (1991) (internal quotation marks omitted).

[106] *Burns*, 500 U.S. at 492, 111 S.Ct. at 1942 (internal quotation marks omitted).

[107] *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993).

[108] *Buckley*, 509 U.S. at 273, 113 S.Ct. at 2615-16.

An official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.[109] "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity."[110] A prosecutor is not absolutely immune for acting in the role of an investigator or policeman if, in so acting, he deprives a plaintiff of rights under the Constitution or federal laws.[111] "[A] prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and . . . conducting them in court," and is thus not entitled to absolute immunity.[112]

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109 *Buckley*, 509 U.S. at 269, 113 S.Ct. at 2613, 125 L.Ed.2d 209 (1993).

110 *Buckley*, 509 U.S. at 273, 113 S.Ct. at 2615 (citing *Burns v. Reed*, 500 U.S. at 494-96, 111 S.Ct. at 1943-44, 114 L.Ed.2d 547 (1991)).

111 *Hart v. O'Brien*, 127 F.3d 424, 439 (5th Cir. 1997) (citing *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 516 (1987)). *See* ¶ 25 of Plaintiff's *First Amended Complaint* alleging that it is "the cops" who usually "get the [rape] kit", suggesting and supporting that this is an investigative function.

112 *Hart*, 127 F.3d at 440 (citing *Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980) (citation and internal quotations omitted)) *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981). *See also, Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) and *Spivey v. Robertson*, 197 F.3d 772 (5th Cir. 1999) (which altered the timing of when absolute immunity may apply; the analysis focusing on whether

Here, Plaintiff challenges the DA's investigatory and administrative functions both prior to the grand jury hearing and at the grand jury hearing. Plaintiff characterizes the DA's pre-grand jury conduct as investigatory, which she claims removes the shield of absolute immunity. Specifically, Plaintiff's alleged pre-grand jury functions of the DA are: failing to request the rape kit and consider it in the investigation;[113] the hand-written notes on the police report;[114] and failing to meet with Plaintiff and other corroborating witnesses.[115] Plaintiff also alleges that the DA failed to call investigators and medical personnel as witnesses at the grand jury hearing.[116]

Relying upon *Imbler v. Pachtman*,[117] the DA argues that he is clearly protected from civil suit by the doctrine of absolute immunity because he was at all times acting in his role as the state's advocate in the prosecution of Boeker.[118] The DA cites numerous cases post-*Imbler* wherein district attorneys were found to be absolutely immune from civil suit.[119] The DA emphasized those instances where absolute

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the prosecutor is acting as an advocate). *See also Lucas v. Parish of Jefferson*, 999 F.Supp. 839 (E.D. La. Mar. 31, 1998) (for a complete history and evolution of absolute immunity).

[113] Rec. Doc. No. 37, p. 3, ¶ 9.

[114] Rec. Doc. No. 37, p. 3, ¶ 10.

[115] Rec. Doc. No. 37, p. 3, ¶ 11.

[116] Rec. Doc. No. 37, p. 3, ¶¶ 12-13.

[117] 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

[118] Rec. Doc. No. 57-1, p. 10.

[119] *Id.*

immunity was granted even where the actions at issue were questionable.[120]

The plaintiff in *Buckley v. Fitzsimmons* alleged that the defendants, state prosecutors who had participated in the early stages of the sheriff's department's investigation, entered into a pre-indictment conspiracy with the sheriff's deputies to create false evidence linking a boot owned by the plaintiff with a bootprint left at a murder scene.[121] The defendants asserted the defense of absolute immunity, but the Supreme Court determined that the defendants had failed to carry their burden of "establishing that they were functioning as 'advocates' when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by [the plaintiff's] foot." In reaching this conclusion, the Court recognized that, although "'the duties of a prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' [t]here is a difference between an advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand."[122]

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[120] *Id*. at pp. 10-12 ("[A]bsolute immunity shelters prosecutors even if when they act 'maliciously, wantonly or negligently'").

[121] *Buckley*, 509 U.S. at 262-72, 113 S.Ct. at 2610-15, 125 L.Ed.2d 209 (1993).

[122] *Buckley*, 509 U.S. at 273, 113 S.Ct. at 2615 (quoting *Imbler*, 424 U.S. at 431, n. 33, 96 S.Ct. at 995, n. 33).

The Supreme Court also noted in *Buckley* that the conduct of the prosecutors was "during the period before they convened a special grand jury," finding that the prosecutors' mission "at that time was entirely investigative in character."[123] The Court stated that it was "well after" the alleged fabrication of evidence that the grand jury was empaneled.[124] Finally, the Court characterized the timing of the conduct in question as occurring before the prosecutors could properly claim to be acting as advocates.[125] Thus, the Court held the defendants were not shielded by absolute immunity.[126]

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123 *Buckley*, 509 U.S. at 274.

124 *Buckley*, 509 U.S. at 275.

125 *Id.*

126 The Court recognizes that the DA disagreed in his reply memorandum that pre-grand jury activities, such as interviewing witnesses or choosing not to interview witnesses, was an investigatory action that removed the prosecutor from the protection of absolute immunity. Rec. Doc. No. 74, p. 3. The DA relied on *Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980). The DA is correct that the Fifth Circuit in *Cook v. Houston Post* stated: "Not all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation." *Cook*, 616 F.2d at 793. However, the Court notes that: (1) *Cook* was decided in 1980, approximately 13 years before the Supreme Court decided *Buckley v. Fitzsimmons*; and (2) the *Cook* opinion is ambiguous as to whether the witness interviews occurred before the grand jury hearing or not. The opinion states that the grand jury investigation had been in progress "several months" before the district attorney was assigned to the case (*Cook*, 616 F.2d at 793), and then stated that the district attorney would have been negligent if he had not interviewed witnesses "before presenting the testimony to the grand jury." *Cook*, 616 F.2d at 793. In fact, there was very little analysis of

The DA also relies on *Charles v. Greenberg*, an Eastern District of Louisiana case, where the testing of a rape kit was at issue.[127] In *Charles*, the plaintiff was exonerated and released from prison for a 1982 aggravated rape conviction after a DNA test of the rape kit revealed that he was not the perpetrator. Following his exoneration, the plaintiff filed suit under 42 U.S.C. § 1983 alleging that the prosecutor wrongfully opposed his post-indictment, pre-trial request to test the rape kit. The prosecutor defendants claimed absolute immunity. After setting forth the controlling standards in *Imbler* and *Buckley*, the *Chalres [sic]* court noted that the requests to have the rape kit tested were post-indictment, presented in court, and the prosecutors' opposition to these requests was heard in court. This was found to be a part of the prosecutors' "official duties" and "directly attached to the judicial process," thus, absolute immunity attached.[128]

The Court finds the holding in *Charles* inapposite to the facts presently before the Court. The challenges to the testing of the rape kit in *Charles* were not pre-indictment. Rather, the issue was litigated in open court as part of the pre-trial evidentiary proceedings following indictment. In *Charles*, the defendant's motion to test the rape kit was an effort to perpetuate exculpatory trial evidence. A prosecutor's in-court

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the action at issue and the timing of same to garner a guiding principle and timeline from the Fifth Circuit in the *Cook* opinion.

127 *Charles v. Greenberg*, 00-958, 2000 WL 1838713 (E.D. La. Dec. 13, 2000). The Court notes that this is the only "rape kit" case from Louisiana federal courts where immunity was an issue.

128 *Charles*, at *2.

advocacy in opposing a request to test a rape kit is part of his/her prosecutorial duties. This is markedly different from the allegations presented herein which involve purported investigative omissions that occurred before the grand jury convened. Taking the allegations as true for purposes of this motion, the Court finds these acts and/or omissions were related to investigation as opposed to advocacy and thus not cloaked by absolute immunity.

The Court finds that the DA's alleged conduct in failing to request, obtain, and examine the rape kit; making notes on the police report; and failing to interview the Plaintiff prior to the grand jury hearing[129] were investigative functions for which absolute immunity does not apply. On the other hand, the alleged failure to call specific witnesses before the grand jury[130] is an advocacy or prosecutorial function for the which the DA is absolutely immune. Thus, the DA is shielded by absolute prosecutorial immunity for the prosecutorial function of determining how to conduct the grand jury hearing. Accordingly, the DA's *Motion to Dismiss* individual capacity claims brought against him based on absolute immunity is granted as to his prosecutorial functions and denied as to his alleged investigative conduct.

3. Qualified Immunity – Individual Capacity Claims

As discussed above, Plaintiff failed to address the DA's individual liability under the Equal Protection Clause, the only viable federal constitutional claim

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[129] Rec. Doc. No. 37, p. 3, ¶¶ 9-11.

[130] Rec. Doc. No. 37, p. 3, ¶¶ 12-13.

asserted, in her *Opposition* memoranda, although she presented argument on this issue at the oral argument.[131] Plaintiff's only *Opposition* response to the DA's assertion of qualified immunity was based on her Due Process/access to the Courts claim, which the Court has held is not a viable constitutional violation under the facts alleged.

Fundamental fairness requires that the Plaintiff be permitted leave to conform her *Opposition* pleading to the oral arguments presented. Accordingly, because Plaintiff is hereby ordered to submit a Rule 7(a) Response to address the DA's individual capacity liability under the Equal Protection Clause and respond to his assertion of the defense of qualified immunity under the deadlines set forth below.

4. Official Capacity Claims

A suit against a government official in his official capacity is the equivalent of filing suit against the government agency of which the official is an agent.[132] Accordingly, the claims against the DA in his official capacity are, in effect, claims against the municipal entity he represents, which is the West Feliciana Parish District Attorney's Office.[133] A plaintiff asserting a Section 1983 claim against a municipal

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131 Rec. Doc. Nos. 70 & 71.

132 *Monell v. New York City Dep't of Soc. Serv, of City of New York*, 436 U.S. 658, 691 n. 55 (1978).

133 *Graham*, 473 U.S. at 165; *see also Bellard v. Gautreaux*, No. CIV.A. 08-627, 2010 WL 3523051, at *4 (M.D. La. Sept. 3, 2010) amended in part, No. CIV.A. 08-627, 2010 WL 4977480 (M.D. La. Dec. 2, 2010), *affirmed*, 675 F.3d 454 (5th Cir. 2012) *and affirmed*, 675 F.3d 454 (5th Cir. 2012).

official in his official capacity or a Section 1983 claim against a municipality "must show that the municipality has a policy or custom that caused his injury."[134] To establish an "official policy," a plaintiff must allege either of the following:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated the policymaking authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.[135]

To state a claim for municipal liability, the policymaker must have final policymaking authority.[136] "[W]hether a particular official has final policymaking authority is a question of *state law*."[137] Moreover, "each and any policy which allegedly caused constitutional violations must be specifically identified by a plaintiff"

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[134] *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007).

[135] *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir.1984).

[136] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

[137] *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (internal quotations omitted) (emphasis in original).

for the necessary determination to be made on the policy's relative constitutionality.[138]

Although "a single decision may create municipal liability if that decision were made by a final policymaker responsible for that activity,"[139] absent an official policy, actions of officers or employees of a municipality do not render the municipality liable under Section 1983.[140] A municipality cannot be held liable under Section 1983 for the tortious behavior of its employees under a theory of *respondeat superior*.[141] "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."[142] However, a plaintiff may establish a policy or custom based on isolated decisions made in the context of a particular situation if the decision was made by an authorized policymaker in whom final authority rested regarding the action ordered.[143]

To state a claim, plaintiffs "must plead facts showing that a policy or custom existed, and that

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138 *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001).

139 *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir.1996) (internal quotations and citations omitted) (emphasis in original).

140 *Id.*

141 *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

142 *Id.*

143 *Cozzo v. Tangipahoa Parish Council–President Gov't*, 279 F.3d 273, 289 (5th Cir. 2002)(citing *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 124-25, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir.1996)).

such custom or policy was the cause in fact or moving force behind a constitutional violation."[144] Liability for failure to promulgate a policy requires that the defendant acted with deliberate indifference.[145] "A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights."[146] "Deliberate indifference is a high standard—'a showing of simple or even heightened negligence will not suffice.'"[147] A mere showing of generalized risk is insufficient to establish deliberate indifference; rather, the plaintiff must show that a reasonable policy maker would conclude that the constitutional deprivation that occurred was a plainly obvious consequence of his decision.[148]

The Supreme Court has expressly prohibited the application of a heightened pleading standard to Section 1983 claims against municipalities.[149] Rather, a

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[144] *McClure v. Biesenbach*, No. 08-50854, 2009 WL 4666485, at *2 (5th Cir. Dec.9, 2008) (unpublished) (citing *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162 (5th Cir.1997)).

[145] *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011).

[146] *Id.* (quoting *Rhyne v. Henderson Cnty.*, 973 F.2d 386, 392 (5th Cir. 1992)).

[147] *Valle v. City of Houston*, 613 F.3d 536, 542 (5th Cir. 2010)(quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001) (quoting *Brown*, 520 U.S. at 407, 117 S.Ct. 1382)).

[148] *Board of Commis of Bryan Cty. v. Brown*, 520 U.S. 397, 411 (1997).

[149] *Jones v. Bock*, 549 U.S. 199, 212–13, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) (citing *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)).

plaintiff need only comply with notice pleading requirements by presenting a "short and plain statement of the claims showing that the pleader is entitled to relief."[150] While boilerplate allegations of inadequate municipal policies or customs are generally sufficient,[151] a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[152]

The following allegations in Plaintiff's *First Amended Complaint* pertain to Plaintiff's claims asserted against the DA in his official capacity:[153]

> 22. On information and belief, the West Feliciana Parish District Attorney's Office does not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing.
>
> 23. On information and belief, at the time of the assaults and through June 2017, the West Feliciana Parish Sheriff's Office did not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing.

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150 *Id.*

151 *See, e.g., Mack v. City of Abilene*, 461 F.3d 547, 556 (5th Cir. 2006); *Ortiz v. Geo Group, Inc.*, No. 07-645, 2008 WL 219564, at *2 (W.D.Tex. Jan.25, 2008); *Jacobs v. Port Neches Police Dept.*, No. 94-767, 1996 WL 363023, at *13-15 (E.D. Tex. June 26, 1996); *DeFrancis v. Bush*, 839 F.Supp. 13, 14 (E.D.Tex.1993).

152 *Mack*, 461 F.3d at 556 (quoting *Leatherman*, 507 U.S. at 168).

153 Rec. Doc. No. 37.

24. Rape kits and sexual assault examinations are known to be evidentiary linchpins in sexual assault cases and former district attorneys, defense attorneys, and victim's advocates agree that proper investigation always includes review of the rape kit and assault examination. They further agree that departmental protocol in both law enforcement and district attorney's offices should require examination and analysis of the kit or exam. Even in cases where DNA testing will not be determinative of whether an assault occurred.

25 As retired East Baton Rouge assistant district attorney Sue Bernie told reporters, "[i]f there's a rape exam done, I can't imagine not looking at the sexual assault exam." East Baton Rouge Coroner Beau Clark noted that when the cops get the kit can change (from case to case), but they always come get the kit and they're the ones that submit it to the crime lab."

. . . .

41. Defendant **SAMUEL D. D'AQUILLA** is the present District Attorney of the 20th Judicial District, a position he has held since 2002. Defendant D'AQUILLA is sued in his official and personal capacity. Defendant D'AQUILLA directly and in conspiracy with other defendants deprived Plaintiff of her constitutional rights.

. . . .

84 During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Ms. Lefebure's constitutional rights to equal protection, due process, and a property right in her rape kit.

85 Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively.

. . . .

89. At all relevant times, Defendants D'Aquilla and Austin acted individually, officially, and under color of law.

90. Defendants D'Aquilla and Austin knew that Ms. Lefebure had provided evidence of sexual assault and further knew that neither Defendant was taking steps to properly investigate her allegations.

91. Defendants D'Aquilla and Austin had a duty to diligently investigate the allegations and to collect the rape kit, submit it to the crime lab for examination, and review it and the sexual assault examination as part of their own investigation.

92. Defendants D'Aquilla and Austin acting individually and together conspired to and engaged in a course of conduct that deprived Ms. Lefebure of her constitutional property right in her DNA samples and rape kit, her right to seek redress in the courts, and of her rights to equal protection and due process

by failing to investigate the accused and failing to pick up, analyze, examine, or submit rape kit and/or sexual assault examination evidence.

93. Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively.

94. With deliberate indifference Defendants D'Aquilla and Austin failed to draft or implement procedures in either the Sheriff's Department or the District Attorney's Office to ensure proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.

95. Defendants D'Aquilla and Austin's deliberate, and willful and wanton conduct created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault, which are disproportionately women, by failing to investigate sexual assault crimes, by fostering an environment whereby perpetrators of sexual assault are allowed to prey on victims without fear of investigation by the West Feliciana Sheriff's Department or District Attorney.

96. On information and belief, Defendant Boeker knew of Defendant D'Aquilla's long-standing refusal to properly investigate sexual assault crimes against women and/or female identified individuals.

97. At all relevant times, Defendants D'Aquilla and Austin's conduct was intentional, under color of law, and motivated by Plaintiff's gender.

98. On information and belief, Defendants have a history of discriminating against women and/or individuals who identify as female. Defendants have failed to investigate or take seriously reports of sexual assault from women and generally treat these allegations with less priority than other crimes not involving sexual assaults against women.

99. Defendants D'Aquilla and Austin, acting individually and collectively, had the duty and ability to prevent the violation of Ms. Lefebure's constitutional rights, but failed to do so. Indeed, their acts lead to the direction violation of Ms. Lefebure's rights.

100. Defendants D'Aquilla and Austin's conduct violated the Fourteenth Amendment's promise of equal protection of the laws and 42 U.S.C. section 1983.

101. As a direct and proximate result of Defendants D'Aquilla and Austin's actions, omissions, policies, practices and customs, Plaintiff was denied the rights afforded to her by the state and federal constitutions.

. . . .

103. A departmental policy established or enacted by either Defendant D'Aquilla or Defendant Austin in their respective municipal organizations requiring collection and

examination of rape kits would have prevented plaintiff's injury, and extreme emotional pain and suffering.

. . . .

107. Defendants D'Aquilla and Austin had a duty to diligently investigate the allegations and to collect the rape kit, submit it to the crime lab for examination, and review it as part of their own investigation.

108. With deliberate indifference Defendants D'Aquilla and Austin failed to implement procedures in either the Sheriff's Department or the District Attorney's Office to provide for proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.

. . . .

111. Defendants D'Aquilla and Austin's deliberate indifference and willful and wanton behavior created a danger and increased risk of harm by sexual assault.

112. Defendants D'Aquilla and Austin's conduct violated the Fourteenth Amendment's promise of substantive due process and 42 U.S.C. section 1983.

113. As a direct and proximate result of Defendants D'Aquilla and Austin's actions, omissions, policies, practices and customs, Plaintiff was denied the rights afforded to her by the state and federal constitutions.

114. Defendants violated Plaintiff's civil rights by having an express policy to not collect evidence or rape kits and/or to not investigate when a female or female-identified person makes a rape or sexual assault allegation. This policy, when enforced, caused a constitutional deprivation to Plaintiff. Even if Defendants' conduct did not rise to the level of an express policy, the practice of failing to properly collect and review rape kits and/or the practice of failing to investigate sexual assault allegations by women was so widespread and/or custom that, although not authorized by written law or express municipal policy, was so permanent and well settled as to constitute a custom or usage with the force of law.

115. Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively. Plaintiff's constitutional injuries inflicted by Defendants were caused by individual's with final policy-making authority in West Feliciana Parish, the West Feliciana Parish Sheriff's Office, and/or the West Feliciana Parish District Attorney's Office.

a. Eleventh Amendment Sovereign Immunity

Notwithstanding the DA's strained attempt at arguing that an official capacity claim against him is barred by Eleventh Amendment sovereign imm-

unity,[154] the Fifth Circuit has held to the contrary in several cases. The law is well-settled that district attorney offices in Louisiana are local government entities and thus not entitled to Eleventh Amendment sovereign immunity.[155]

b. Absolute Immunity

The Court finds that the DA is likewise not immune from an official capacity suit based on the defense of absolute prosecutorial immunity. In *Burge v. Parish of St. Tammany*, the Fifth Circuit held that "the district court erred in granting summary judgment for the District Attorney in his official capacity on the basis of his absolute prosecutorial immunity because that form of personal or individual immunity is not available in an official capacity suit."[156] The *Burge* court held:

> We conclude that the District Attorney is not entitled to have the official capacity suit dismissed for either of the grounds used by the district court. Instead, the *crucial issues appear to be whether the District Attorney failed to establish adequate policies, proce-*

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[154] *See* Rec. Doc. No. 57-1 fn 11 (acknowledging Fifth Circuit jurisprudence foreclosing the DA's argument).

[155] *See Kentucky v. Graham*, 473 U.S. 159, 167,(1985); *Burge*, 187 F.3d at 466; *Hudson v. City of New Orleans*, 174 F .3d 677, 691 (5th Cir. 1999). *See also Spikes v. Phelps*, 131 F. App'x 47, 49 (5th Cir. 2005) ("based on Louisiana law, . . . a parish district attorney is not entitled to Eleventh Amendment immunity").

[156] 187 F.3d 452, 467 (5th Cir. 1999)(citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)).

> *dures or regulations* to ensure adequate training and supervision of employees with respect to the government's *Brady* responsibility; if so, whether the need to control the agents of the government was so obvious, and the inadequacy of the existing practice so likely to result in the violation of constitutional rights, that the District Attorney can reasonably be said to have been deliberately indifferent to the need; and, if so, whether the District Attorney's deliberate indifference and failure to establish such policies, procedures, or regulations caused Burge's constitutional injury.
>
> Official capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent. *Monell*, 436 U.S. at 691 n. 55, 98 S.Ct. 2018. *Unlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit, either absolute or qualified, under § 1983. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).[157]

In *Burrell v. Adkins*, the plaintiffs brought a Section 1983 lawsuit against the former and current District Attorneys of Union Parish, claiming that the District Attorneys had, *inter alia*, caused the plaintiffs to be falsely arrested and imprisoned, deliberately withheld *Brady* material, and maintained an official

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157 *Id.* at 466-67 (emphasis added).

policy "designed to facilitate and condone his office's non-disclosure of *Brady* material to criminal defendants, in violation of plaintiffs' constitutional rights in this case."[158] The court explained the standard applicable to the plaintiffs' *Monell* claims:

> Municipalities cannot be held liable for constitutional torts under Section 1983 on a *respondeat superior* theory, but they can be held liable when execution of a government's policy or custom, whether made by its lawmakers or *by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury*. *Burge*, 187 F.3d at 471, citing *Monell*, 436 U.S. at 689, 98 S.Ct. at 2018. Thus, a plaintiff seeking to impose liability on a municipality under Section 1983 is required to identify a municipal policy, or custom, that caused the plaintiff's injury. *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403-404, 117 S.Ct. 1382, 1388 (1997). The "official policy" requirement may be proven in at least three different ways: (1) when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy, (2) where no official policy was announced or promulgated but the action of the policymaker itself violated a constitutional right; and (3) even when the policymaker fails to act affirmatively at all, if the need to take some action to control the agents of the

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158 2007 WL 4699169, at *4 (W.D. La. Oct. 23, 2007).

> local governmental entity is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need. *Burge*, 187 F.3d at 471, and cases cited therein.

Relying heavily on *Burge*, the court stated that "[a] district attorney is the independent and final official policymaker for all administrative and prosecutorial functions of his office."[159] The court noted that "the only issue before the court is whether the *Brady* violations were committed pursuant to 'official policy.'"[160] The court ultimately found that:

> Since former District Attorney Adkins was found to have been directly involved in the alleged *Brady* violations, plaintiffs have satisfied the requirements of *Monell* by proving that actions of the policy maker, which represented official policy, violated their constitutional rights. Thus, the real party in interest in this suit against Adkins and Levy in their official capacities, the office of the District Attorney of Union Parish (currently held by Levy), is liable to plaintiffs.[161]

Although the *Burrell* decision was addressing a case at the summary judgment stage, the holding demonstrates that district attorneys are not absolutely

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159 *Id.* at *5 (citing *Burge*, 187 F.3d at 469).

160 *Id.* at *10.

161 *Id.*

immune from *Monell* liability where it is found that a policy or custom directly implemented by a district attorney caused constitutional injury. Accordingly, the DA is not shielded from *Monell* liability by absolute prosecutorial immunity. The Court now turns to a discussion of the elements of Plaintiff's *Monell* claims.

c. Policymaker

It is undisputed that DA D'Aquilla is a policymaker. Under Louisiana state law, a district attorney "shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury."[162] Accordingly, DA D'Aquilla is the policymaker with final policymaking authority for the West Feliciana Parish District Attorney's Office.

d. Official Custom or Policy

Plaintiff must plead sufficient facts to establish the existence of an official policy or custom. An "official policy" may be established in one of three ways: (1) "when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy; (2) where no rule has been announced as 'policy' but federal law has been violated by an act of the policymaker itself; and (3) even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the government 'is so obvious, and the inadequacy [of existing practice] so likely to

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162 La. Const. Art. V, § 26; *see also* La. Rev. Stat. § 16:1.

result in the violation of constitutional rights, that the policymaker . . . can reasonably be said to have been deliberately indifferent to the need.'"[163] From the Plaintiff's *Amended Complaint*, it appears her allegations fit within the second and third categories.

Specifically, Plaintiff alleges that, on information and belief, the West Feliciana Parish District Attorney's Office does not currently, nor did it at the time of the alleged assaults and through June 2017, have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing.[164] Plaintiff further alleges that, with deliberate indifference, DA D'Aquilla failed to draft or implement procedures in the District Attorney's Office to ensure proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.[165] Plaintiff also alleges that, on information and belief, Defendant Boeker knew of DA D'Aquilla's "long-standing refusal to properly investigate sexual assault crimes against women and/or female identified individuals,"[166] and Defendants "have a history of discriminating against women and/or individuals who identify as female. Defendants have failed to investigate or take seriously reports of sexual assault from women and generally treat these allegations with

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163 *Bd. of Cty. Commis of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 417-19, 117 S.Ct. 1382, 1395 (1997) (Souter, J., dissenting), (quoting *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205 (1989)).

164 Rec. Doc. No. 37, ¶¶ 22 & 23.

165 *Id.* at ¶ 94.

166 *Id.* at ¶ 96.

less priority than other crimes not involving sexual assaults against women."[167] Finally, Plaintiff alleges that "[a] departmental policy established or enacted by . . . Defendant D'Aquilla . . . in their respective municipal organizations requiring collection and examination of rape kits would have prevented plaintiff's injury, and extreme emotional pain and suffering."[168]

Additionally, Plaintiff has alleged that DA D'Aquilla directly participated in the allegedly unconstitutional conduct. Plaintiff alleges that: the DA refused to examine or pick up her rape kit;[169] his mark-up of the police report highlighted only Plaintiff's possible discrepancies and cast doubt only on Plaintiff;[170] neither the DA nor any member of his staff met with Plaintiff in person prior to the grand jury hearing, nor did they ever speak to her about the alleged assaults;[171] at the grand jury hearing, the DA did not call the police officers who investigated the case or the nurse who conducted Plaintiff's sexual exam, and no expert from the coroner's office was called to testify about the rape kit;[172] the DA attempted to proceed to the grand jury hearing without Plaintiff's testimony after he reneged on a promise to her lawyer that he would give her a

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167 *Id.* at ¶ 98.

168 *Id.* at ¶ 103.

169 *Id.* at ¶ 9.

170 *Id.* at ¶ 10.

171 *Id.* at ¶ 11.

172 *Id.* at ¶ 12.

continuance to prepare;[173] after a no true bill, the DA told reporters that the issue in the case was credibility and there were no photos or witness cooperation;[174] the DA told reporters he did not pick up or examine the rape kit because it was unnecessary because it would not speak to the issue of consent;[175] the DA told reporters that Defendant Boeker claimed it was consensual but "kind of rough" sex, a simple credibility call;[176] days after a news station reported that Plaintiff's rape kit was never retrieved or examined, the DA told the Advocate that his office had called the coroner's office and asked for the rape kit multiple times;[177] the DA told reporters that he presents everything in his file every time there is a grand jury;[178] and the DA met with Boeker and his attorney, who is related to the DA, after his arrest[179] and conspired with other Defendants, including Plaintiff's alleged rapist, to ensure that Boeker would not be investigated for rape.[180]

These very specific factual allegations dispel the DA's argument that Plaintiff's allegations are conclusory or boilerplate. The Court must accept Plain-

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[173] *Id.* at ¶ 14.

[174] *Id.* at ¶ 17.

[175] *Id.* at ¶ 20.

[176] *Id.* at ¶ 21.

[177] *Id.* at ¶ 26.

[178] *Id.* at ¶ 27.

[179] *Id.* at ¶ 77, 80.

[180] *Id.* at ¶ 82.

tiff's allegations as true for the purpose of this motion, and Plaintiff's factual allegations are specific and, in many instances, purport to be quotes given to the media. Plaintiff is not required to prove her case at the Rule 12(b)(6) stage, and the Court finds that her claim that it was policy or customary practice for the DA to fail to investigate or give credence to reports of sexual assault by women is plausible under the facts pled. Further, the facts pled, if proven, would constitute deliberate indifference rather than mere negligence on the part of the DA.

e. Moving Force Behind Constitutional Violations

The DA maintains that Plaintiff has failed to state a claim because she has not alleged a constitutional violation. Plaintiff claims that the DA's conduct and policy violated her constitutional rights to equal protection and due process/access to the courts. The Court has determined as set forth above that Plaintiff has alleged a constitutional violation under the Equal Protection Clause.

f. Equal Protection Clause[181]

Plaintiff alleges that the DA's

> deliberate, willful, and wanton conduct created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault, which are disproportionately women, by failing to investigate sexual assault crimes, by fostering an environment whereby perp-

181 The Court adopts by reference the discussion and analysis set forth above in Section II.D.1.a of this *Ruling*.

> etrators of sexual assault are allowed to prey on victims without fear of investigation by the West Feliciana Sheriff's Department or District Attorney.[182]

Plaintiff further alleges, on information and belief, that Defendant Boeker knew of the DA's "longstanding refusal to properly investigate sexual assault crimes against women and/or female identified individuals."[183] Plaintiff claims that Defendants' conduct was purposeful and motivated by Plaintiff's gender.[184] Plaintiff also alleges, on information and belief, that Defendants have a history of discriminating against women and/or individuals who identify as female in that Defendants have failed to investigate or take seriously reports of sexual assault from women and generally treat these allegations with less priority than other crimes not involving sexual assaults against women.[185] Finally, Plaintiff claims that Defendants violated Plaintiff's civil rights

> by having an express policy to not collect evidence or rape kits and/or to not investigate when a female or female-identified person makes a rape or sexual assault allegation. This policy, when enforced, caused a constitutional deprivation to Plaintiff. Even if Defendants' conduct did not rise to the level of an express policy, the practice of failing to properly collect and review rape kits

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[182] Rec. Doc. No. 37, ¶ 95.

[183] *Id.* at ¶ 96.

[184] *Id.* at ¶ 97.

[185] *Id.* at ¶ 98.

> and/or the practice of failing to investigate sexual assault allegations by women was so widespread and/or custom that, although not authorized by written law or express municipal policy, was so permanent and well settled as to constitute a custom or usage with the force of law.[186]

As set forth above, to sustain a gender-based equal protection challenge, a plaintiff must show "(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom or practice."[187] Plaintiff allegations as detailed above satisfy this three-part test. However, the Court finds that Plaintiff has failed to allege a "class of one" cause of action, which she pleads in the alternative. To state a class of one equal protection claim, a plaintiff must offer a comparator she contends is similarly situated, but treated more favorably for no rational purpose.[188] Plaintiff has not alleged a similarly situated comparator. In accordance with the Court's statements at the oral argument, Plaintiff will be granted leave to amend on this issue.

Accordingly, the DA's *Motion to Dismiss* official capacity claims asserted against him is DENIED as

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186 *Id.* at ¶ 114.

187 *Shipp*, 234 F.3d at 914.

188 *Monumental Task Comm., Inc. v. Foxx*, No. 15-6905, 2016 WL 5780194, at *3 (E.D. La. Oct. 4, 2016) (citing *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007)) (emphasis added).

to Plaintiff's Equal Protection claim but is GRANTED as to all other official capacity claims and Plaintiff's class of one Equal Protection claim, subject to leave to amend.

E. 42 U.S.C. §§ 1983 & 1985 (2) and (3) Civil Conspiracy Claims

"In order to prevail on a section 1983 conspiracy claim, a plaintiff must establish (1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy."[189] Regarding the first element: "To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act."[190] "Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss."[191] "[M]ore than a blanket of accusation is necessary to support a § 1983 claim."[192] Plaintiff must make "specific allegation[s] of fact tending to show a prior agreement has been made."[193]

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189 *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990); *see also Jabary v. City of Allen*, 547 F. App'x 600, 610 (5th Cir. 2013) ("To prove a conspiracy under § 1983, a plaintiff must allege facts that indicate (1) there was an agreement among individuals to commit a deprivation, and (2) that an actual deprivation occurred." (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir.1994)).

190 *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982) (Rubin, J.).

191 *Id.* (citing *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977)).

192 *Id.* (citations omitted).

193 *See id*. at 1023-24.

Nevertheless, a Section 1983 conspiracy "claim need not [meet] a 'probability requirement at the pleading stage; [plausibility] simply calls for enough fact [s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.'"[194] Plaintiff's "facts, when 'placed in a context . . . [must raise] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'"[195]

As to the second element, "[r]egardless of whether or not [a defendant's] actions alone actually caused a constitutional violation, liability can still be imposed on him through his alleged membership in the conspiracy."[196] That is, "[a] conspiracy allegation under § 1983 allows a plaintiff to 'impose liability on all of the defendants without regard to who committed the particular act.'"[197]

"A conspiracy may be charged under section 1983 as the legal mechanism through which to impose liability on all of the defendants without regard to who committed the particular act, but 'a conspiracy claim is not actionable without an actual violation of section 1983.'"[198] For example, "in a case alleging both Fourth Amendment violations and a § 1983 conspiracy, the proper order of review is first whether Plaintiffs

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194 *Jabary*, 547 F. App'x at 610 (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955).

195 *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955).

196 *Latiolais v. Cravins*, 484 F. App'x 983, 991 (5th Cir. 2012) (citing *Hale v. Townley*, 45 F.3d 914, 920-21 (5th Cir.1995)).

197 *Jabary*, 547 F. App'x at 610 (citing *Hale*, 45 F.3d at 920).

198 *Hale*, 45 F.3d at 920 (quoting *Pfannstiel*, 918 F.2d at 1187).

have alleged a constitutional violation that is objectively unreasonable in light of clearly established Fourth Amendment law, *and only if that is the case* should the court then consider whether Plaintiffs have alleged a conspiracy."[199] Thus, in *Hale*, the Fifth Circuit found that, because all of the alleged conspirators were entitled to qualified immunity on plaintiff's First Amendment claim, the conspiracy claim was not actionable.[200]

The Court finds that Plaintiff has alleged a viable constitutional violation of the Equal Protection Clause; thus, the Court must consider whether Plaintiff has sufficiently pled facts to state a claim for a Section 1983 civil conspiracy claim.

Plaintiff has also asserted a civil conspiracy claim under 42 U.S.C. § 1985(2) and (3). "Section 1985 prohibits a conspiracy to interfere with civil rights."[201] In order to state a 42 U.S.C. § 1985 claim, a plaintiff must allege the following: "(1) a conspiracy by the defendants, (2) with a purpose of depriving the plaintiff of equal protection of the laws or equal privileges and immunities under the law, (3) a purposeful intent to discriminate, (4) action by the defendants under color of state law or authority, and (5) injury to the person or property of the plaintiff or his deprivation of a right or privilege as a citizen of the United States resulting from actions in furtherance

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199 *Morrow v. Washington*, 672 F. App'x 351, 355 (5th Cir. 2016) (emphasis in original).

200 *Hale*, 45 F.3d at 921.

201 *Bishop v. J.O. Wyatt Pharm.*, 2015 WL 4997890, at *7 (N.D. Tex. Aug. 21, 2015).

of the conspiracy."[202] Additionally, the plaintiff must assert "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[203]

The district court for the Northern District of Texas explained how the Fifth Circuit and the Supreme Court have interpreted 42 U.S.C. § 1985(2) and (3):

> The first clause of § 1985(2) "prohibits conspiracies to deter witnesses from attending court or testifying, punishing witnesses who have so attended or testified, or injure jurors." *Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 687 n. 6 (5th Cir. 2010). The clause has been read as protecting any party, witness, or juror from intimidation regardless of any racial animus on the part of the defendant. *Montoya*, 614 F.3d at 149 (citing *Kush v. Rutledge*, 460 U.S. 719, 723-27, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). The second clause of § 1985(2) "prohibits conspiracies to deny any citizen equal protection of the laws or injure a citizen for his efforts to ensure the rights of others to equal protection." *Bryant*, 597 F.3d at 687. Since the equal protection language in the second clause of § 1985(2) parallels the equal protection language in § 1985(3), the race or class-based animus requirement of § 1985(3) also applies to claims under the second part of § 1985(2). *See Daigle v. Gulf State Utils.*

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[202] *Id.* (citing *Granville v. Hunt*, 411 F.2d 9, 11 (5th Cir. 1969)).

[203] *Suttles v. U.S. Postal Service*, 927 F.Supp. 990, 1001 (S.D. Tex. 1996)(quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

> *Co., Local Union No. 2286*, 794 F.2d 974, 979 (5th Cir. 1986) (citing *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 346 (5th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981)).[204]

In this case, Plaintiff relies on the second clause of § 1985(2) and (3). The DA contends that Plaintiff has failed to state viable 42 U.S.C. § 1985(2) and (3) conspiracy claims against him. He argues that, "for the same reasons that preclude Plaintiff from having standing," and because "the allegations against D'Aquilla are not sufficient," Plaintiff fails to state a claim upon which relief may be granted.[205]

The Court finds that Plaintiff has alleged sufficient facts to support a claim for civil conspiracy under Sections 1983 and 1985. Plaintiff alleges in detail that the DA and the other named Defendants conspired together or that they were motivated by a class-based animus, *i.e.*, gender. Specifically, Plaintiff alleges:

> From the moment of his arrest, Defendant Boeker was not treated as a suspect in a crime, but instead given preferential treatment by Defendant West Feliciana Parish District Attorney Samuel D. D'Aquilla and his office and West Feliciana Parish Sheriff J. Austin Daniel and his office.[206]

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204 *Payne v. Universal Recovery, Inc.*, 2011 WL 7415414, at *8 (N.D. Tx. Dec. 7, 2011).

205 Rec. Doc. No. 57-1, p. 17.

206 Rec. Doc. No. 37, p. 2, ¶ 6.

Within 24 hours of his arrest, Mr. Boeker's attorney Jerome Cy D'Aquilla – relative of Defendant District Attorney Sam D'Aquilla – secured two bond reductions totaling $77,000.00. Mr. Boeker did not spend a single night in custody and his remaining, reduced bond was paid largely by an unknown source from Ascension Parish.[207]

After his release, Defendant Boeker faced no investigation or scrutiny from the District Attorney or the Sheriff.[208]

Both the District Attorney and the Sheriff refused to examine or pick up Ms. Lefebure's rape kit and sexual assault examination, which showed bruising consistent with trauma.[209]

Defendant D'Aquilla's markup of the police report highlighted only possible discrepancies in Ms. Lefebure's description of the events. His handwritten notes cast only doubt on Ms. Lefebure, with 'drinking' written out and heavily underlined, and the words 'go get the stuff,' 'where are the texts,' and 'NO [*illegible*] plead 5' and 'plead 5th.' None of these phrases were included in the police report itself or Ms. Lefebure's description of the events and Mr. and Mrs. Boeker are the

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[207] Rec. Doc. No. 37, p. 2, ¶ 7.

[208] Rec. Doc. No. 37, p. 2, ¶ 8.

[209] Rec. Doc. No. 37, p. 3, ¶ 9.

only parties alleged to have been drinking at the time of either assault.[210]

Prior to the grand jury hearing Defendant D'Aquilla did not meet with Ms. Lefebure in person or speak with her about the assaults. He told reporters he was 'uncomfortable' with speaking with her. No one from Defendant D'Aquilla's office or staff met with Ms. Lefebure either.[211]

Defendant D'Aquilla also noted that '[e]very time we have a grand jury, we present everything we have in our file.' If Defendant D'Aquilla's office had retrieved the rape kit as any other prosecutor would have, the photos of the bruising and the exam would have been presented to the grand jury.[212]

Defendant Sheriff Austin admitted to reporters at WBRZ that his office made an error by not picking up Ms. Lefebure's rape kit and exam and that it should have been processed sooner. He told the news station on June 26, 2017, that he had recently issued a verbal protocol to everyone in his office that rape kits need to be sent to the crime lab when they are collected.[213]

Defendant Sheriff Austin and Defendant District Attorney D'Aquilla did not pick up

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[210] Rec. Doc. No. 37, p. 3, ¶ 10.

[211] Rec. Doc. No. 37, p. 3, ¶ 11.

[212] Rec. Doc. No. 37, p. 6, ¶ 27.

[213] Rec. Doc. No. 37, p. 6, ¶ 28.

> the rape kit and examination until, at the earliest, March 10, 2017. *See* Exhibit B. This was only days after WBRZ reported that the kit had not been retrieved or tested.[214]
>
> Ms. Lefebure's rape kit did not make it to the state crime lab until six months after her assault and two months after Mr. D'Aquilla refused to his job as a district attorney and investigate and seek the indictment of Defendant Boeker.[215]
>
> Instead of protecting her rights as the victim of a violent crime, the Defendants derided Ms. Lefebure throughout the process, denied her information about and access to victim resources, and violated her rights to equal protection and due process of the law by willfully refusing to do their jobs and instead colluding protect [sic] an alleged rapist from prosecution.[216]
>
> Plaintiff is informed and believes and thereon alleges that each Defendant was at all material times an agent, servant, employee, partner, joint venture, co-conspirator, and/or alter ego of the remaining Defendants, and in doing the things herein alleged, was acting within the course and scope of that relationship. Plaintiff is further informed and believes and thereon alleges that each of the Defendants herein gave consent, aid,

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214 Rec. Doc. No. 37, p. 6, ¶ 29.

215 Rec. Doc. No. 37, p. 6, ¶ 30.

216 Rec. Doc. No. 37, p. 7, ¶ 32.

and assistance to each of the remaining Defendants, and ratified and/or authorized the acts or omissions of each Defendant as alleged herein, except as may be hereinafter specifically alleged. At all material times, each Defendant was jointly engaged in tortious activity and integral participant in the conduct described herein, resulting in the deprivation of Plaintiff's constitutional rights and other harm.[217]

Mr. Boeker's defense counsel was Attorney Jerome Cy D'Aquilla, a relative of the elected District Attorney and Defendant Sam D'Aquilla.[218]

On information and belief, after he was arrested Mr. Boeker met with Defendant D'Aquilla and/or Defendant Austin, and his lawyer and an unknown Warden from the prison to ensure that he was given preferential treatment and not required to stay in jail for any length of time.[219]

During this meeting Defendant Boeker claimed that he and Ms. Lefebure had been having consensual sex and that she was lying. On information and belief, the unknown DOE Warden colluded with Defendant Boeker

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[217] Rec. Doc. No. 37, p. 10, ¶ 47.

[218] Rec. Doc. No. 37, p. 15, ¶ 77.

[219] Rec. Doc. No. 37, p. 15, ¶ 80.

> to corroborate his false claim of a consensual relationship.[220]
>
> During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Mr. Boeker was not investigated for the alleged rapes.[221]
>
> During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Mr. Boeker would not be convicted of the alleged rapes.[222]
>
> During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Ms. Lefebure's constitutional rights to equal protection, due process, and a property right in her rape kit.[223]
>
> Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively.[224]

Finally, Plaintiff re-asserts these allegations in summarizing the supporting allegations for her Third

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[220] Rec. Doc. No. 37, p. 15, ¶ 81.

[221] Rec. Doc. No. 37, p. 15, ¶ 82.

[222] Rec. Doc. No. 37, p. 16, ¶ 83.

[223] Rec. Doc. No. 37, p. 16, ¶ 84.

[224] Rec. Doc. No. 37, p. 16, ¶ 85.

Cause of Action pursuant to 42 U.S.C. §§ 1983 and 1985.[225]

As demonstrated above, Plaintiff's conspiracy allegations contain particular detail, including allegations of specific meetings and agreements in furtherance of the conspiracy and of "long-standing" practices adverse to women and sexual assault victims.

Accordingly, the DA's *Motion to Dismiss* Plaintiff's claims under Sections 1983 and 1985 is DENIED.

F. State Law Claims

It appears that the only state law claim asserted against the DA is abuse of process. In Louisiana, "[t]he essential elements of a cause of action for abuse of process are (1) the existence of an ulterior purpose; and (2) a willful act in the use of the process not in the regular prosecution of the proceeding."[226] "The precise inquiry involves the misuse of a process already issued whereby a party attempts to obtain some result not proper under the law."[227] The DA moves to dismiss this claim on the grounds of absolute prosecutorial immunity.[228]

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225 Rec. Doc. No. 37, pp. 21-22, ¶¶ 117-126.

226 *Duboue v. City of New Orleans*, 909 F.2d 129, 132 (5th Cir. 1990) (citations omitted).

227 *Id.*

228 The Court notes that most of the caselaw upon which Defendant relies in seeking immunity from Plaintiff's state law claims concern malicious prosecution claims. Plaintiff is not an alleged perpetrator, criminal defendant, or former criminal defendant; rather, she is the purported victim of an alleged rape and alleged sexual assault. Therefore, the collection of malicious

In *Singleton v. Cannizzaro*,[229] the district court for the Eastern District of Louisiana recently addressed the application of *Imbler/Buckley* absolute prosecutorial immunity to state law claims:

> Because determining whether a prosecutor enjoys absolute immunity turns on "the nature of the function performed" by the prosecutor, this Court must analyze the "specific activities that give rise to the cause of action." In other words, absolute immunity attaches to specific conduct, not specific claims.20 If specific conduct is protected by absolute immunity, and that same conduct forms either a crucial foundation for or the entire basis of certain claims, a finding of absolute immunity may well defeat certain claims on a 12(b)(6) motion.[230]
>
> * * *
>
> [T]he Louisiana Supreme Court in *Knapper v. Connick* held that prosecutors enjoy absolute immunity against state law claims in addition to the immunity they enjoy from § 1983 claims. The full scope of absolute prosecutorial immunity under Louisiana law is not clear, but the Louisiana Supreme Court in *Knapper* cited heavily to federal law in its decision and adopted the functional approach that federal courts employ when

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prosecution cases relied upon by Defendant are not germane to the issue of prosecutorial absolute immunity in this matter.

229 372 F.Supp.3d 389 (E.D. La. 2019).

230 *Id.* at *3 (citations omitted).

> analyzing prosecutorial absolute immunity issues. For this reason, any conduct for which prosecutors enjoy absolute immunity in this case will apply equally to Plaintiffs' federal and state law claims.[231]

As set forth repeatedly above, Plaintiff has alleged detailed facts that, if proven, sufficiently state a claim for abuse of process under Louisiana law. Further, as held above regarding Plaintiff's federal claims, to the extent Plaintiff's state abuse of process claims implicate prosecutorial rather than investigative or administrative conduct, Defendant is entitled to absolute prosecutorial immunity for that conduct. Thus, the DA's *Motion to Dismiss* Plaintiff's state law abuse of process claim is GRANTED in part and DENIED in part. Plaintiff cannot maintain an individual abuse of process cause of action against the DA for conduct that is prosecutorial. The Defendant's motion is denied with respect to an individual capacity abuse of process claim for investigatory and administrative conduct and is also denied as to the abuse of process claims asserted against the Defendant in his official capacity under Louisiana law.

III. Conclusion

For the reasons stated above, the *Motion to Dismiss*[232] filed by Defendant, Samuel C. D'Aquilla, District Attorney for the 20th Judicial District, is GRANTED in part and DENIED in part as set forth above. Plaintiff's request for leave of court to amend her *Complaint* is GRANTED, a second and final time,

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231 *Id.* at *4 (citations omitted).

232 Rec. Doc. No. 57.

and shall be submitted within thirty (30) days from the date of this *Order*. Plaintiff is also ordered to file a Rule 7(a) Response to the DA's assertion of the defense of qualified immunity as to the remaining individual capacity claims within this same deadline.

IT IS SO ORDERED.

Signed in Baton Rouge, Louisiana on June 25, 2019.

/s/ Shelly D. Dick
Chief Judge,
United States District Court
Middle District of Louisiana

APPENDIX E:
FIRST AMENDED COMPLAINT
AND JURY DEMAND
(MAY 6, 2018)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRISCILLA LEFEBURE, AN INDIVIDUAL,

Plaintiff,

v.

BARRETT BOEKER, ASSISTANT WARDEN LOUISIANA STATE PENITENTIARY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, WEST FELICIANA PARISH, SAMUEL D. D'AQUILLA, 20TH JUDICIAL DISTRICT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY DISTRICT ATTORNEY, J. AUSTIN DANIEL, SHERIFF, WEST FELICIANA PARISH, THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, INSURANCE COMPANY DOES 2-5, DOES 6-20,

Defendant.

Civil Case No.: 3:17-cv-1791-JWD-EWD

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1. In the early morning hours of December 1, 2016, Louisiana State Penitentiary Assistant Warden Barrett Boeker violently raped Plaintiff Priscilla Lefebure at his home on the prison grounds. Mr. Boeker told Ms. Lefebure that no one would be able to hear her scream

and insisted she watch in a mirror as he assaulted her. The next day Mr. Boeker called Ms. Lefebure and told her not to tell anyone what had happened.

2. To further intimidate her into silence, Mr. Boeker again sexually assaulted Ms. Lefebure on December 3, 2016, this time with a foreign object. Only hours after this assault, Mr. Boeker stood in the doorway of his children's bedroom, where Ms. Lefebure had been trying to sleep in an attempt to protect herself, and masturbated while staring at her.

3. Ms. Lefebure was able to get herself to physical safety the next day and had a sexual assault examination and rape kit done at Woman's Hospital in Baton Rouge on the morning of December 8th.

4. The examination noted the assaults on December 1st and 3rd. It showed bruising on Ms. Lefebure's inner and upper thighs and her right arm and left shin in the pattern of finger and hand prints. It noted that her cervix was red and irritated. The exam included photos of the bruising.

5. Sadly, Ms. Lefebure's nightmare did not end once she was physically safe and given medical treatment. While Mr. Boeker was arrested for second degree rape on December 20, 2016, he was never indicted or convicted. Instead, Ms. Lefebure was treated as the accused from the beginning, and Mr. Boeker was able to use his official position and connections to law enforcement and parish officials to ensure he would not be held accountable for his actions.

6. From the moment of his arrest, Defendant Boeker was not treated as a suspect in a crime, but instead given preferential treatment by Defendant

West Feliciana Parish District Attorney Samuel D. D'Aquilla and his office and West Feliciana Parish Sheriff J. Austin Daniel and his office.

7. Within 24 hours of his arrest, Mr. Boeker's attorney Jerome Cy D'Aquilla — relative of Defendant District Attorney Sam D'Aquilla—secured two bond reductions totaling $77,000.00. Mr. Boeker did not spend a single night in custody and his remaining, reduced bond was paid largely by an unknown source from Ascension Parish.

8. After his release, Defendant Boeker faced no investigation or scrutiny from the District Attorney or the Sheriff.

9. Both the District Attorney and the Sheriff refused to examine or pick up Ms. Lefebure's rape kit and sexual assault examination, which showed bruising consistent with trauma.

10. Defendant D'Aquilla's markup of the police report highlighted only possible discrepancies in Ms. Lefebure's description of the events. His handwritten notes cast only doubt on Ms. Lefebure, with "drinking" written out and heavily underlined, and the words "go get the stuff," "where are the texts," and "NO [*illegible*] plead 5" and "plead 5th." None of these phrases were included in the police report itself or Ms. Lefebure's description of the events and Mr. and Mrs. Boeker are the only parties alleged to have been drinking at the time of either assault.

11. Prior to the grand jury hearing, Defendant D'Aquilla did not meet with Ms. Lefebure in person or speak with her about the assaults. He told reporters he was "uncomfortable" speaking with her. No one

from Defendant D'Aquilla's office or staff met with Ms. Lefebure either.

12. The two officers from Defendant Sheriff Austin's office who investigated the case were not called as witnesses. The nurse who conducted the sexual assault examination was not asked to testify. And no expert from the coroner's office that stored the rape kit for months was called to testify, something that is done in other cases.

13. Finally, neither witness who could corroborate Ms. Lefebure's state of mind, fear, anxiety, and retelling of events in the days between and after the assaults was called, even though they were at the courthouse and available to testify while the grand jury was meeting.

14. Indeed, Defendant D'Aquilla even attempted to proceed to the grand jury hearing without Ms. Lefebure's testimony when he reneged on a promise to her lawyer that he would accept her request to continue the hearing so she could prepare with her recently-retained counsel.

15. When Defendant D'Aquilla told Ms. Lefebure's lawyer the morning of the grand jury proceeding that he would not uphold his promise to get a continuance, he explained that Mr. Boeker needed to return to his family and his job and he wouldn't delay the proceedings any longer. Ms. Lefebure had also been ill over the weekend and asked only for a day or two continuance.

16. With the rape kit and physical evidence sitting in the East Baton Rouge coroner's office, without corroborating witness testimony, and having watched Defendant D'Aquilla impugn Ms. Lefebure's

credibility on the stand while bolstering Defendant Boeker's, the grand jury failed to return an indictment. Although the victim of a brutal and violent crime, Ms. Lefebure had become the accused.

17. Defendant D'Aquilla told reporters afterward that the issue in the case was credibility and he did not have photos or witness cooperation. The case, he explained, rose and fell exclusively on the statements from Defendant Boeker and Ms. Lefebure and their respective credibility.

18. Defendant D'Aquilla made clear he never believed Ms. Lefebure and that, even though he had never met with her, he believed she was there to be deceptive. "If somebody's squirming around, not paying attention, you are smart enough to know [they are] trying to be deceptive. That's why she was there."

19. District attorneys and sexual assault experts agree that victims of trauma often demonstrate confusion or forget details. This is because trauma has a chaotic effect on the brain and memory.

When asked by reporters why he did not pick up or examine the rape kit, Defendant D'Aquilla said it was not necessary to review the kit or exam because, although the victim reported she did not consent and was physically forced to have sex with Defendant Boeker, the issue in the case was consent. According to Defendant D'Aquilla, nothing in the kit or exam could shed light on whether Ms. Lefebure consented to sex with Defendant Boeker.

21. Ms. Lefebure never once told law enforcement or anyone she spoke with that she ever had consensual sex with Defendant Boeker. The only person to have reported consensual sex was Defendant Boeker. As

Defendant D'Aquilla told reporters, "[i]t was not a question of whether or not she had bruises. [Boeker] got up there and told his side of the story, 'We had sex and it was consensual, we got kind of rough,' . . . It was just credibility."

22. On information and belief, the West Feliciana Parish District Attorney's Office does not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing.

23. On information and belief, at the time of the assaults and through June 2017, the West Feliciana Parish Sheriff's Office did not have a policy requiring rape kits and sexual assault examinations to be picked up and reviewed or sent to the state crime lab for testing.

24. Rape kits and sexual assault examinations are known to be evidentiary linchpins in sexual assault cases and former district attorneys, defense attorneys, and victim's advocates agree that proper investigation always includes review of the rape kit and assault examination. They further agree that departmental protocol in both law enforcement and district attorney's offices should require examination and analysis of the kit or exam. Even in cases where DNA testing will not be determinative of whether an assault occurred.

25. As retired East Baton Rouge assistant district attorney Sue Bernie told reporters, "[i]f there's a rape exam done, I can't imagine not looking at the sexual assault exam." East Baton Rouge Coroner Beau Clark noted that when the cops get the kit can change (from case to case), but they always come get

the kit and they're the ones that submit it to the crime lab."

26. Only days after WBRZ reported that the rape kit and examination had never been picked up or examined, Defendant D'Aquilla curiously told the Advocate that his office had actually called the East Baton Rouge Parish coroner to ask for the kit multiple times. He could not confirm how or when someone from his office contacted the coroner's office.

27. Defendant D'Aquilla also noted that "[e]very time we have a grand jury, we present everything we have in our file." If Defendant D'Aquilla's office had retrieved the rape kit as any other prosecutor would have, the photos of the bruising and the exam would have been presented to the grand jury.

28. Defendant Sheriff Austin admitted to reporters at WBRZ that his office made an error by not picking up Ms. Lefebure's rape kit and exam and that it should have been processed sooner. He told the news station on June 26, 2017, that he had recently issued a verbal protocol to everyone in his office that rape kits need to be sent to the crime lab when they are collected.

29. Defendant Sheriff Austin and Defendant District Attorney D'Aquilla did not pick up the rape kit and examination until, at the earliest, March 10, 2017. *See* Exhibit B. This was only days after WBRZ reported that the kit had not been retrieved or tested.

30. Ms. Lefebure's rape kit did not make it to the state crime lab until six months after her assault and two months after Mr. D'Aquilla refused to do his job as a district attorney and investigate and seek the indictment of Defendant Boeker.

31. The examination and kit included this documentation of bruising on Ms. Lefebure's body (each mark is a 1-2 centimeter bruise):

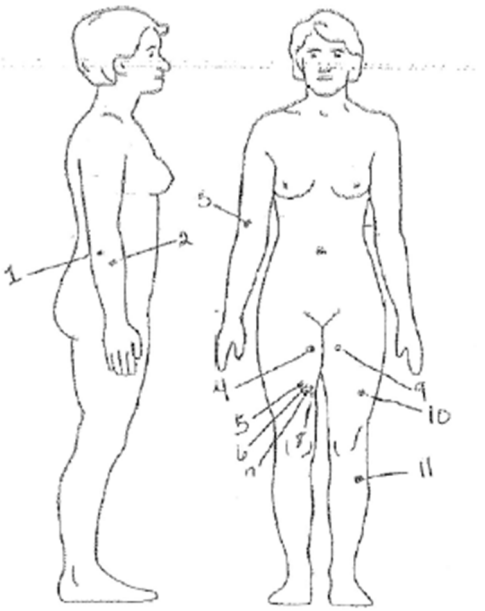

Exhibit A.

32. Instead of protecting her rights as the victim of a violent crime, the Defendants derided Ms. Lefebure throughout the process, denied her information about and access to victim resources, and violated her rights to equal protection and due process of the law by willfully refusing to do their jobs and instead colluding protect an alleged rapist from prosecution.

33. Ms. Lefebure has lived in constant fear and emotional stress ever since the grand jury returned a "no true bill." She has seen her familial relationships torn apart, she has been homeless, and forced to drop out of nursing school. Having been denied any

assistance from the victim impact fund because of the Defendants' actions, she has been without the medical and mental health care she needed.

34. In spite of the physical injury and severe emotional trauma, she has fought tirelessly through traditional and social media to hold Mr. Boeker, Mr. D'Aquilla, and Mr. Daniel accountable. She has continued to tell the details of what happened to her and how she fears that Mr. Boeker will find her and assault her again, fears that he has and will continue to assault other women, and fears that members of the Sheriff's Office or the District Attorney's Office, including the Sheriff and the District Attorney themselves, will retaliate against her for continuing to speak openly about the assault. Ms. Lefebure now brings this action for violation of her civil rights and the horrible assault against her.

JURISDICTION AND VENUE

35. This is a civil rights action arising under Title 42 of the United States Code Sections 1983, 1988, 12131, 12205, and the Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred on this Court by Title 28 of the United States Code, Sections 1331 and 1343.

36. Plaintiff further invokes the supplemental jurisdiction of this Court under Title 28 of the United States Code, Section 1367, to hear and decide related claims arising under state law. The amount in controversy, excluding interests and costs, exceeds the minimum jurisdictional limit of this Court. A jury trial is requested.

37. Venue is proper in the United States District Court for the Middle District of Louisiana pursuant to 28 U.S.C. § 1391 because all parties reside in the State of Louisiana and the acts and omissions giving rise to this lawsuit occurred in a parish covered by the Middle District.

PLAINTIFF

38. Plaintiff **PRISCILLA LEFEBURE** is a person of full age and majority and a resident of the State of Louisiana.

39. Plaintiff brings her claims individually under 42 U.S.C. §§ 1983, 1985, and 1988, the United States Constitution, federal and state civil rights laws, and the laws of the State of Louisiana, including but not limited to Louisiana Civil Code articles 2315, 2316, 2317, and 3493.

DEFENDANTS

40. Defendant BARRETT BOEKER is an Assistant Warden at the Louisiana State Penitentiary. He is a resident of West Feliciana Parish, living in tax payer funded housing for correctional officers within the prison grounds. Defendant BOEKER is sued in his official and personal capacity.

41. Defendant SAMUEL D. D'AQUILLA is the present District Attorney of the 20th Judicial District, a position he has held since 2002. Defendant D'AQUILLA is sued in his official and personal capacity. Defendant D'AQUILLA directly and in conspiracy with other defendants deprived Plaintiff of her constitutional rights.

42. Defendant J. AUSTIN DANIEL is the Sheriff of West Feliciana Parish, a position he has held since 2006. Defendant J. AUSTIN DANIEL is sued in his official and personal capacity. Defendant J. AUSTIN DANIEL directly and in conspiracy with other defendants deprived Plaintiff of her constitutional rights.

43. Defendant PARISH OF WEST FELICIANA is a political subdivision of the State of Louisiana. Defendant's Daniel and D'Aquilla were at all pertinent times and remain employed by the Parish.

44. Defendant THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY is an insurance company incorporated under the laws of the State of Delaware and doing business in the State of Louisiana. Defendant Princeton Excess is the Parish of West Feliciana's insurance carrier.

45. INSURANCE COMPANY DOES 2-5 are as yet unknown insurance companies who, upon information and belief, have issued and currently have in effect one or more policies of insurance covering one or more Defendants named herein.

46. Plaintiff is ignorant of the true names and capacities of Defendant DOES 6-20 and therefore sue these Defendants by such fictitious names. Plaintiff is informed and believe and on that basis alleges that each Doe Defendant so names is responsible in some manner for the injuries and damages she sustained, as set forth herein. Plaintiff will amend her complaint to state the names and capacities of DOES 6-20 when they have been ascertained. DOES 6-20 are sued in their official and personal capacities.

47. Plaintiff is informed and believes and thereon alleges that each Defendant was at all material times

an agent, servant, employee, partner, joint venturer, co-conspirator, and/or alter ego of the remaining Defendants, and in doing the things herein alleged, was acting within the course and scope of that relationship. Plaintiff is further informed and believes and thereon alleges that each of the Defendants herein gave consent, aid, and assistance to each of the remaining Defendants, and ratified and/or authorized the acts or omissions of each Defendant as alleged herein, except as may be hereinafter specifically alleged. At all material times, each Defendant was jointly engaged in tortious activity and an integral participant in the conduct described herein, resulting in the deprivation of Plaintiff's constitutional rights and other harm.

48. At all material times, each Defendant acted under color of the laws, statutes, ordinances, and regulations of the State of Louisiana.

49. This complaint may be pled in the alternative pursuant to Federal Rule of Procedure 8(d).

GENERAL ALLEGATIONS

50. Plaintiff re-alleges each and every paragraph in this complaint as if fully set forth here.

51. Plaintiff Priscilla Lefebure is the first cousin of Defendant Barrett Boeker's wife. In late 2016, Ms. Lefebure was a guest in Mr. and Mrs. Boeker's home on the grounds of the Louisiana State Penitentiary as she had to evacuate her home in Baton Rouge after flooding in August of 2016.

52. On or about November 16, 2016, Ms. Lefebure was retrieving things from the trunk of her car at the Boeker's home. Mr. Boeker came out of the home and

grabbed a lanyard she was wearing around her neck and pulled her towards him, trying to kiss her. Mr. Boeker was intoxicated, as he was most nights during Ms. Lefebure's stay. Ms. Lefebure pushed him away and told him to stop. When she asked him why he was doing that, Defendant Boeker only smirked and pulled on the lanyard again. Ms. Lefebure pushed his hands away and told him not to do that again.

53. Mr. Boeker did not listen. On or about the late evening of November 30 and early morning of December 1, 2016, Defendant Barrett Boeker raped Plaintiff Priscilla Lefebure at his home on the grounds of the Louisiana State Penitentiary.

54. Mr. Boeker's wife, Plaintiff's first cousin, was away from the home for a few nights during this first assault, and had left Ms. Lefebure in charge of her two young children.

55. During the December 1 assault, Ms. Lefebure had gone into Mrs. Boeker's room to retrieve a phone charger that Mrs. Boeker had borrowed from her. When she turned around to exit, Mr. Boeker was standing in the room. When she tried to exit, Mr. Boeker grabbed her and threw her on the bed. She begged him not to touch her, saying no over and over again and trying to push him off of her. He had, to Ms. Lefebure's knowledge, at least half a pint of whiskey that night.

56. Ms. Lefebure is approximately 5'5" and weighs around 115 lbs. Mr. Boeker is 6'2" and weighs approximately 220 lbs. She was unable to force Mr. Boeker off of her even as she kicked and screamed.

57. Mr. Boeker proceeded to hold both of Ms. Lefebure's arms down and pin her to the bed. He told her "I tried to be a gentleman, but I couldn't help

myself." He then forced his penis into Ms. Lefebure's mouth.

58. Ms. Lefebure froze from shock and fear. Mr. Boeker became angry that she was not cooperating with his assault and forced Ms. Lefebure on her stomach. She begged him to stop and pleaded for her cousin to return. Defendant Boeker told her "[g]uess what, [she] isn't here and she will not be back until Sunday. No one can help you. No one can hear you screaming."

59. Defendant Boeker then grabbed Ms. Lefebure by both of her arms and yanked her up, telling her to get on her knees. He then forced her legs apart and forced his penis into Ms. Lefebure's vagina, pulling her hair back so hard that her neck hurt and forced her to watch him raping her in the mirror while telling her how beautiful she was.

60. As soon as Mr. Boeker was no longer physically restraining Ms. Lefebure, she ran into the bathroom and took a bath. The next day, Mr. Boeker called Ms. Lefebure and told her not to tell anyone what happened. Ms. Lefebure had stayed the night only to ensure the Boeker children were not left alone until their mother returned the next day.

Fearing for her safety, but without a home to return to, Ms. Lefebure left on December 1st to stay with friends in New Orleans. After two nights, those accommodations ran out and Ms. Lefebure was forced to return to Defendant Boeker's home on December 3rd. She hoped that with his wife back in the home she would be safe enough to retrieve her things and her two pets. Unfortunately for Ms. Lefebure, Mr. Boeker would not be deterred and in the early morning

hours of December 4, 2016, Mr. Boeker again sexually assaulted Ms. Lefebure, this time with a foreign object.

62. On that December 3rd Saturday, the Boekers had several neighbors over to their home at the prison for drinking and partying. Ms. Lefebure was not in a position to challenge Defendant Boeker at this time, but needed her things, her pets, and safety. At some point, when Mrs. Boeker went to bed and passed out, Ms. Lefebure went into the bedroom with her, where her two children were also sleeping. She thought that if she was with her cousin, she would not be harassed or assaulted.

63. Again, Defendant Boeker would not be deterred. He entered the room where Mrs. Boeker, their children, and Ms. Lefebure were and told Ms. Lefebure to get up. She refused, and he grabbed her by the arms and tried to pull her out of the room. Faster this time, Ms. Lefebure escaped his clutches and Mr. Boeker left the house.

64. Ms. Lefebure had tried earlier in the evening to get a ride off the prison grounds with Mr. Boeker's sister and her husband. Officer and Warden housing at the prison is behind the security gates, which is the only way in and out of the prison.

65. Trapped for the night, but only needing to pass a few hours until her cousin woke up and she could leave, Ms. Lefebure locked herself in the Boeker children's empty bedroom.

66. At some point, Defendant Boeker picked the lock to his children's bedroom and around 2:00 a.m. on December 4, 2016, Ms. Lefebure awoke to find Defendant Boeker standing over her, telling her he had picked the lock on the door.

He then assaulted Ms. Lefebure again, this time forcing her legs apart with his hands and using a sex toy to penetrate her vaginally. Ms. Lefebure begged and pleaded with him to stop, finally freeing herself enough to kick him off of her. The two assaults left her with at least eleven fingerprint shaped and other bruises.

68. With no way to leave, Ms. Lefebure locked the door again to try and get through the remaining hours. She awoke once more to find Defendant Boeker again having picked the lock, standing in the doorway. This time he was masturbating while staring at Ms. Lefebure in his children's bedroom.

69. Ms. Lefebure remained the next day to complete the chores she promised her cousin she would do in exchange for staying at her home. She then was able to leave and returned only to get the remainder of her things on Wednesday December 7th.

70. During that December 7th visit Mrs. Boeker was intoxicated, but questioned Ms. Lefebure about her mood and why she was leaving. Ms. Lefebure told her Defendant Boeker had raped her. To which Mrs. Boeker replied, "I knew this was going to happen."

71. The two left together to go to Baton Rouge, during the drive Mrs. Boeker told Ms. Lefebure that Defendant Boeker had also raped her sister six years ago and another girl at a party a few years back.

72. On information and belief, Defendant Boeker has also sexually assaulted a number of the inmates at the Louisiana State Penitentiary and has been the subject of numerous Prison Litigation Reform Act (PRLA) claims. He is known by inmates to be a dangerous and violent warden.

73. Ms. Lefebure and Mrs. Boeker met up with Defendant Boeker's sister in a bar in Baton Rouge that Wednesday and stated she was not surprised it happened and apologized.

74. Before Ms. Lefebure went to Woman's Hospital for an exam and treatment, Mrs. Boeker begged her not to report the rape or tell anyone who did it or where it happened.

75. Ms. Lefebure was given a sexual assault examination at Woman's Hospital the morning of Thursday December 8, 2016. Exhibit A.

76. The examination documents the pattern of fingerprint bruises on Ms. Lefebure's inner and upper thighs, and the fingerprint bruises on her arms and shin. *Id.*

77. Mr. Boeker's defense counsel was Attorney Jerome Cy D'Aquilla, a relative of the elected District Attorney and Defendant Sam D'Aquilla.

78. Defendant Boeker was given two bond reductions, totaling $77,000, and only posted a fraction of his bond with $40,000 in equity from his home.

79. At the time of the assaults, Defendant Boeker was an Assistant Warden at the prison, living in tax payer funded housing on the prison's "B-Line."

80. On information and belief, after he was arrested Mr. Boeker met with Defendant D'Aquilla and/or Defendant Austin, and his lawyer and an unknown Warden from the prison to ensure that he was given preferential treatment and not required to stay in jail for any length of time.

81. During this meeting Defendant Boeker claimed that he and Ms. Lefebure had been having consensual sex and that she was lying. On information and belief, the unknown DOE Warden colluded with Defendant Boeker to corroborate his false claim of a consensual relationship.

82. During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Mr. Boeker was not investigated for the alleged rapes.

83. During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Mr. Boeker would not be convicted of the alleged rapes.

84. During this meeting, and at other times since, but before the convening of the grand jury, Defendants Boeker, D'Aquilla, and Austin conspired to ensure that Ms. Lefebure's constitutional rights to equal protection, due process, and a property right in her rape kit.

85. Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively.

86. Since the assault Ms. Lefebure has experienced severe emotional distress and trauma. She was denied access to the Louisiana Victim Compensation Fund and was informed by the fund coordinator that Defendant D'Aquilla repeatedly denied his requests to obtain the case file so that he could provide assistance to Ms. Lefebure.

87. Since the assault and grand jury hearing, Ms. Lefebure has had flashbacks, nightmares, loss of sleep and appetite. Her social and familial relations have been strained. She was forced to drop out of nursing school because of the emotional trauma and her lack of funding for mental health care. She has been unable to find or maintain employment and continues to suffer from post-traumatic stress disorder, depression, and other mental and physical health issues. In short, Ms. Lefebure's life has been completely altered since Defendant Boeker violently assaulted her and the grand jury failed to return an indictment.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983 – VIOLATION OF FOURTEENTH AMENDMENT EQUAL PROTECTION AND LOUISIANA CONSTITUTION ARTICLE I, SECTION 3, RIGHT TO INDIVIDUAL DIGNITY (DEFENDANTS WEST FELICIANA PARISH, D'AQUILLA, AND AUSTIN IN INDIVIDUAL AND OFFICIAL CAPACITIES)

88. Plaintiff repeats and realleges each allegation of the complaint.

89. At all relevant times, Defendants D'Aquilla and Austin acted individually, officially, and under color of law.

90. Defendants D'Aquilla and Austin knew that Ms. Lefebure had provided evidence of sexual assault and further knew that neither Defendant was taking steps to properly investigate her allegations.

91. Defendants D'Aquilla and Austin had a duty to diligently investigate the allegations and to collect the rape kit, submit it to the crime lab for examination,

and review it and the sexual assault examination as part of their own investigation.

92. Defendants D'Aquilla and Austin acting individually and together conspired to and engaged in a course of conduct that deprived Ms. Lefebure of her constitutional property right in her DNA samples and rape kit, her right to seek redress in the courts, and of her rights to equal protection and due process by failing to investigate the accused and failing to pick up, analyze, examine, or submit rape kit and/or sexual assault examination evidence.

93. Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively.

94. With deliberate indifference Defendants D'Aquilla and Austin failed to draft or implement procedures in either the Sheriff's Department or the District Attorney's Office to ensure proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.

Defendants D'Aquilla and Austin's deliberate, and willful and wanton conduct created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault, which are disproportionately women, by failing to investigate sexual assault crimes, by fostering an environment whereby perpetrators of sexual assault are allowed to prey on victims without fear of investigation by the West Feliciana Sheriff's Department or District Attorney.

96. On information and belief, Defendant Boeker knew of Defendant D'Aquilla's long-standing refusal

to properly investigate sexual assault crimes against women and/or female-identified individuals.

97. At all relevant times, Defendants D'Aquilla and Austin's conduct was intentional, under color of law, and motivated by Plaintiff's gender.

98. On information and belief, Defendants have a history of discriminating against women and/or individuals who identify as female. Defendants have failed to investigate or take seriously reports of sexual assault from women and generally treat these allegations with less priority than other crimes not involving sexual assaults against women.

99. Defendants D'Aquilla and Austin, acting individually and collectively, had the duty and ability to prevent the violation of Ms. Lefebure's constitutional rights, but failed to do so. Indeed, their acts lead to the direction violation of Ms. Lefebure's rights.

100. Defendants D'Aquilla and Austin's conduct violated the Fourteenth Amendment's promise of equal protection of the laws and 42 U.S.C. section 1983.

101. As a direct and proximate result of Defendants D'Aquilla and Austin's actions, omissions, policies, practices and customs, Plaintiff was denied the rights afforded to her by the state and federal constitutions.

102. As a direct and proximate result of Defendants D'Aquilla and Austin's actions, Plaintiff suffered extreme emotional pain and suffering.

103. A departmental policy established or enacted by either Defendant D'Aquilla or Defendant Austin in their respective municipal organizations requiring collection and examination of rape kits would have

prevented plaintiff's injury, and extreme emotional pain and suffering.

SECOND CAUSE OF ACTION

42 U.S.C. §§ 1983 – FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS AND LOUISIANA CONSTITUTION ARTICLE I, SECTION 2, DUE PROCESS (DEFENDANTS WEST FELICIANA PARISH, D'AQUILLA, AND AUSTIN IN INDIVIDUAL AND OFFICIAL CAPACITIES)

104. Plaintiff repeats and realleges each allegation of the complaint.

105. At all relevant times, Defendants D'Aquilla and Austin acted individually and together, and under color of law.

106. Defendants D'Aquilla and Austin knew that Ms. Lefebure had provided evidence of sexual assault and further knew that neither Defendant was taking steps to properly investigate her allegations.

107. Defendants D'Aquilla and Austin had a duty to diligently investigate the allegations and to collect the rape kit, submit it to the crime lab for examination, and review it as part of their own investigation.

108. With deliberate indifference Defendants D'Aquilla and Austin failed to implement procedures in either the Sheriff's Department or the District Attorney's Office to provide for proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.

109. On information and belief, Defendant Boeker knew of Defendant D'Aquilla's longstanding refusal

to investigate allegations against Wardens, Assistant Wardens, and/or correctional officers and employees at the Louisiana State Penitentiary.

110. Defendants D'Aquilla and Austin, acting individually and collectively, had the duty and ability to prevent the violation of Ms. Lefebure's constitutional rights, but failed to do so.

111. Defendants D'Aquilla and Austin's deliberate indifference and willful and wanton behavior created a danger and increased risk of harm by sexual assault.

112. Defendants D'Aquilla and Austin's conduct violated the Fourteenth Amendment's promise of substantive due process and 42 U.S.C. section 1983.

113. As a direct and proximate result of Defendants D'Aquilla and Austin's actions, omissions, policies, practices and customs, Plaintiff was denied the rights afforded to her by the state and federal constitutions.

114. Defendants violated Plaintiff's civil rights by having an express policy to not collect evidence or rape kits and/or to not investigate when a female or female-identified person makes a rape or sexual assault allegation. This policy, when enforced, caused a constitutional deprivation to Plaintiff. Even if Defendants' conduct did not rise to the level of an express policy, the practice of failing to properly collect and review rape kits and/or the practice of failing to investigate sexual assault allegations by women was so widespread and/or custom that, although not authorized by written law or express municipal policy, was so permanent and well settled as to constitute a custom or usage with the force of law.

115. Defendants D'Aquilla and Austin are the elected and effective policy makers for the District Attorney's Office and the Sheriff's Department, respectively. Plaintiff's constitutional injuries inflicted by Defendants were caused by individual's with final policymaking authority in West Feliciana Parish, the West Feliciana Parish Sheriff's Office, and/or the West Feliciana Parish District Attorney's Office.

116. As a direct and proximate result of Defendants actions, Plaintiff suffered extreme emotional pain and suffering.

THIRD CAUSE OF ACTION

42 U.S.C. §§ 1983 AND 1985 – CIVIL CONSPIRACY TO VIOLATE CIVIL RIGHTS (ALL DEFENDANTS)

117. Plaintiff repeats and realleges each allegation of the complaint.

118. Each Defendant, acting in concert with one another and other yet-unknown coconspirators, conspired to violate Ms. Lefebure's civil rights and ensure that Defendant Boeker walked free.

119. Defendants Boeker, D'Aquilla, Austin, Warden DOE, and other DOES met shortly after Defendant Boeker's arrest on December 20, 2016, and as yet unknown other times, and agreed that Defendant Boeker was telling the truth and the Plaintiff Lefebure was lying. They further agreed at that meeting and, on information and belief, at likely other meetings to not investigate the case against Defendant Boeker and/or to ensure that Defendant Boeker would not face criminal liability for raping Ms. Lefebure.

120. On information and belief, Defendants D'Aquilla and Austin agreed they would not retrieve the rape kit or examination until after the grand jury convened.

121. On information and belief, Defendant Austin told his investigating officers that they were not to investigate the case or question Defendant Boeker.

122. On information and belief, Defendant D'Aquilla told his staff that they were not to investigate the case or question Defendant Boeker.

123. On information and belief, Defendant Boeker represented that he was being investigated by Defendants D'Aquilla and Daniel so as to hide the conspiracy and ensure he would not face criminal liability for raping Ms. Lefebure.

124. Defendants each made and took concrete acts in furtherance of the agreement to use their official positions and power under color of law to violate Ms. Lefebure's federal and state constitutional rights to, *inter alia*, due process, equal protection, and the property interest in her rape kit.

125. As a direct and proximate result of the Defendants' conspiracy, Plaintiff suffered damages, including bodily injury, pain, suffering, mental distress, anguish, humiliation, loss of liberty, loss of enjoyment, and loss of income, as set forth more fully above.

126. Each individual Defendant is therefore liable for the violation of Plaintiff's rights by any other individual Defendant.

FOURTH CAUSE OF ACTION

42 U.S.C. §§ 1983-ABUSE OF PROCESS
(ALL DEFENDANTS)

127. Plaintiff repeats and realleges each allegation of the complaint.

128. Defendants are jointly, severally, and *in solido* liable to Plaintiff for the state tort of abuse of process, as more fully set forth above.

129. Defendants, each acting in concert with the other, did willfully, unlawfully, maliciously, and feloniously use the Court's process, including but not limited to the grand jury process, primarily for an ulterior and illegal purpose—to protect Defendant Boeker from criminal liability and to violate Ms. Lefebure's state and federal constitutional rights.

130. Defendants each acting in concert with the other, did willfully, unlawfully, maliciously, and feloniously fail to comply with the proper procedures or rules set out by law for conducting official actions.

131. As a direct result of these acts and omissions and abuse of the Court's process, Plaintiff suffered great pain, distress, anguish, humiliation, fear, and monetary damages.

132. Plaintiff repeats and realleges each allegation of the complaint.

SIXTH CAUSE OF ACTION

INTENTIONAL AND NEGLIGENCE STATE TORTS –
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS,
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS,
ASSAULT, BATTERY, FALSE IMPRISONMENT, RAPE,
SEXUAL BATTERY (AGAINST DEFENDANT BOEKER)

133. Plaintiff repeats and realleges each allegation of the complaint.

134. Defendant Boeker's conduct was extreme and outrageous. Knowing that the emotional distress suffered by the Plaintiff was severe, Defendant Boeker desired or acted with recklessness to inflict severe emotional distress and/or knew that severe emotional distress would be certain or substantially certain to result from his violent sexual assault. Defendant Boeker maliciously assaulted Ms. Lefebure not once, but twice, then made every effort to ensure he would never be held accountable. On information and belief, Defendant Boeker has inflicted similar sexual assault, harm, and emotional distress on numerous other victims.

135. Defendant Boeker committed intentional offensive contact with Plaintiff without right, and put her in apprehension of such contact.

136. Defendant Boeker's actions were the cause-in-fact of Plaintiff's injuries.

SEVENTH CAUSE OF ACTION

STATE LAW DIRECT ACTION CLAIM
(ALL DEFENDANT INSURANCE COMPANIES)

137. Plaintiff repeats and realleges each allegation of the complaint.

138. Defendant Princeton Excess has issued and/or currently has in effect one or more insurance policies covering Defendants D'Aquilla and Daniel, named herein. For valuable consideration received, these policies obligated Defendant Princeton Excess, jointly and/or severally, to pay on behalf of their insured Defendant(s) any sums the insured Defend-

ant(s) may become obligated to pay to Plaintiff or to indemnify their insured Defendant(s) for any sums the insured Defendant(s) may become obligated to pay to Plaintiff.

139. Defendant DOE Insurance Companies, on information and belief, have issued and/or currently have in effect one or more policies of insurance covering one or more of the Defendants named herein. For valuable consideration received, these policies obligated Defendant Insurance Companies, jointly and/or severally, to pay on behalf of their insured Defendant(s) any sums the insured Defendant(s) may become obligated to pay to Plaintiff or to indemnify their insured Defendant(s) for any sums the insured Defendant(s) may become obligated to pay to Plaintiff.

140. By reason of their illegal and unconstitutional acts, Defendants are liable to Plaintiff for all damages and injuries Plaintiff has suffered as a result. Upon information and belief, Defendants Princeton Excess and DOE Insurance Companies are contractually obligated to pay these sums on behalf of the insured Defendant(s).

141. On information and belief, Defendants Princeton Excess and DOE Insurance Companies are liable to Plaintiff for any and all damages incurred by reason of the insured Defendant(s)' acts, up to their policy limits, notwithstanding the fact that the insured Defendant(s) may themselves be able to assert claims of privilege or immunity from liability.

142. Under Louisiana Revised Statute § 22:655 (B), Plaintiff brings a direct action against Defendants Princeton Excess and DOE Insurance Companies to recover any and all sums they are obligated to pay

Plaintiff on behalf of their insureds or to indemnify their insureds.

DAMAGES

As a result of the acts and omissions of the Defendants as described above, the Plaintiff has damages including, but not limited to conscious and severe physical, mental, and emotional distress, and pain and suffering; economic and other monetary injury including, but not limited to, loss of earnings, loss of work prospects, loss of future income, and loss of past income; and, any other such damage cognizable under these laws and statutes and provable at trial.

PRAYER FOR RELIEF

144. WHEREFORE, Plaintiff prays that after due proceedings there be judgment rendered in her favor and against all Defendants individually and jointly as follows:

i. A declaration that Defendants' policies and procedures, or lack thereof, allowing sexual assault cases brought by women, or those who identify as female, to remain uninvestigated and which allow rape kits and sexual assault examinations to go without review or analysis violates the Fourteenth Amendment to the United States Constitution;

ii. Granting permanent injunctive relief enjoining Defendants and their predecessors, successors, present or former agents, representatives, those acting in privity or concert with them, or on their behalf, from violating

the Fourteenth Amendments of the United States Constitution;

iii. Granting permanent injunctive relief requiring Defendants to present a plan to the Court within 60 days that provides for:

1. A written policy requiring the West Feliciana Sheriff's Office and the West Feliciana District Attorney's Office to collect and review rape kits and sexual assault examinations, send them to the crime lab for testing, and present them as evidence in grand jury proceedings;

2. A plan for implementing the policies;

3. Training for all members of each office on the written policy;

4. Training for all members of each office on sexual assault awareness.

iv. Compensatory and punitive damages as prayed for herein;

v. Reasonable attorney's fees, all costs of these proceedings including expert witness fees under 42 U.S.C. 1988 and 12205, *et seq.*, and legal interest at the standard rate;

vi. Prejudgment and post-judgment interest at the standard federal rate;

vii. That this matter be tried by jury;

viii. All other relief that this honorable Court deems just and proper.

Respectfully submitted,

/s/ Michelle M. Rutherford
La. Bar No. 34968
RUTHERFORD LAW
1700 S. Rampart St.
New Orleans, LA 70113
(323) 641-0784
michelle@rfordlaw.com
Counsel for Plaintiff
Priscilla Lefebure